BOND, SL DOC

U.S. District Court
Middle District of Florida (Tampa)
CRIMINAL DOCKET FOR CASE #: 8:13-cr-00178-JDW-AEP-1

Case title: USA v. Montgomery Date Filed: 04/10/2013

Assigned to: Judge James D. Whittemore
Referred to: Magistrate Judge Anthony E. Porcelli

Defendant (1)

Nova A. Montgomery represented by **Lisset Gonzalez Hanewicz**
Lisset G. Hanewicz
P.O. Box 7474
St. Petersburg, FL 33734
727-914-4070
Email: lisset@thelawyersolution.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Lowell H. Becraft , Jr.
Law Office of Lowell H. Becraft
403-C Andrew Jackson Way
Huntsville, AL 35801
256/533-2535
Email: becraft@hiwaay.net
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Pending Counts	**Disposition**
26:7201.F ATTEMPT TO EVADE OR DEFEAT TAX (1-5)	
26:7201.F ATTEMPT TO EVADE OR DEFEAT TAX (1s-5s)	

26:7203D.F WILLFUL FAILURE TO FILE RETURN/INFORMATION, ETC. (6s-10s)

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
None	

Highest Offense Level (Terminated)

None

Complaints	**Disposition**
None	

Surety

Karen Paron

Plaintiff

USA represented by **Mark E. Bini**
US Attorney's Office - FLM
Suite 3200
400 N Tampa St
Tampa, FL 33602
813/274-6000
Fax: 813/274-6103
Email: Mark.Bini@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Robert Monk
U.S. Attorney's Office
Middle District of Florida
400 N. Tampa St., Suite 3200
Tampa, FL 33602
813/274-6000

Fax: 813/274-6103
Email: robert.monk@usdoj.gov
TERMINATED: 08/05/2013
LEAD ATTORNEY
Designation: Retained

Date Filed	#	Docket Text
04/10/2013	1	INDICTMENT returned in open court as to Nova A. Montgomery (1) count(s) 1-5. (BES) (Entered: 03/07/2014)
04/10/2013	2	MOTION to Seal Indictment and Related Documentsby USA as to Nova A. Montgomery. (BES) Motions referred to Magistrate Judge Anthony E. Porcelli. (Entered: 03/07/2014)
04/10/2013	3	ORDER granting 2 Motion to Seal Indictment and Related Documents as to Nova A. Montgomery (1). Signed by Magistrate Judge Mark A. Pizzo on 04/10/13. (BES) (Entered: 03/07/2014)
08/05/2013	5	Notice of substitution of AUSA. Mark E. Bini substituting for Robert T. Monk. (BES) (Entered: 03/07/2014)
03/07/2014		Arrest of Nova A. Montgomery on 3/7/14 (CAW) (Entered: 03/07/2014)
03/07/2014	6	Minute Entry for proceedings held before Magistrate Judge Thomas G. Wilson: Initial Appearance/Bail as to Nova A. Montgomery held on 3/7/2014, to retian own attorney (Attorney Becraft to arrange pro hac vice and made limited appearance). Detention Hearing as to Nova A. Montgomery held on 3/7/2014; Government requested detention, defendant requested bail; bond set at $200,000 secured bond (forfeiture agreement on property of friend); travel in Middle District of Florida, cannot change residence without first getting permission of court, report by phone by 4 PM every Friday to Pre-Trial Services, cooperate in providing DNA specimen, surrender passport to Pre-Trial prior to release. Arraignment to be set in about 2 weeks before Judge Anthony Porcelli. (3:14-3:37) (CAW) (Entered: 03/07/2014)
03/10/2014	7	NOTICE OF HEARING as to Nova A. Montgomery: Arraignment set for 3/24/2014 at 10:00 AM in Tampa Courtroom 10 A before Magistrate Judge Anthony E. Porcelli. (waiver of presence at arraignment can be filed)(LV) (Entered: 03/10/2014)
03/17/2014	8	ARREST Warrant Returned Executed on 4/7/14, as to Nova A. Montgomery. (EJC) (Entered: 03/18/2014)
03/17/2014	9	APPEARANCE BOND entered as to Nova A. Montgomery in amount of $200,000.00. (EJC) (Entered: 03/18/2014)

03/17/2014	10	ORDER Setting Conditions of Release as to Nova A. Montgomery (1) Appearance Bond. Signed by Magistrate Judge Thomas G. Wilson on 3/7/2014. (EJC) (Entered: 03/18/2014)
03/19/2014	11	WAIVER of Personal Appearance at Arraignment and Entry of Plea of Not Guilty by Nova A. Montgomery (Becraft, Lowell) (Entered: 03/19/2014)
03/19/2014	12	MOTION for Lowell Becraft to appear pro hac vice *without local counsel* by Nova A. Montgomery. (Becraft, Lowell) (Entered: 03/19/2014)
03/19/2014	13	MOTION to Modify Conditions of Release *to change address* by Nova A. Montgomery. (Becraft, Lowell) Motions referred to Magistrate Judge Anthony E. Porcelli. (Entered: 03/19/2014)
03/20/2014	14	ENDORSED ORDER REFERRING MOTION as to Nova A. Montgomery re: 12 MOTION for Lowell Becraft to appear pro hac vice *without local counsel*. Signed by Judge James D. Whittemore on 3/20/2014. (KE) Motions referred to Magistrate Judge Anthony E. Porcelli. (Entered: 03/20/2014)
03/20/2014	15	ORDER granting 12 Motion to appear pro hac vice as to Nova A. Montgomery. However, Counsel is directed to secure local counsel pursuant to Local Rule 2.02. Please see Order for further details. Signed by Magistrate Judge Anthony E. Porcelli on 3/20/2014. (DNE) (Entered: 03/20/2014)
03/20/2014	16	ACCEPTANCE OF WAIVER of defendant's presence at arraignment as to Nova A. Montgomery. Signed by Magistrate Judge Anthony E. Porcelli on 3/20/2014. (LV) (Entered: 03/20/2014)
03/20/2014	17	NOTICE canceling arraignment hearing scheduled for March 24, 2014 as to Nova A. Montgomery (waiver of presence at arraignment filed) (LV) (Entered: 03/20/2014)
03/20/2014	18	PRETRIAL discovery order and notice as to Nova A. Montgomery. Jury Trial set for the May 2014 trial term beginning week of 5/5/2014 at 09:00 AM in Tampa Courtroom 13 B before Judge James D. Whittemore. Status Conference set for 4/10/2014 at 01:30 PM in Tampa Courtroom 13 B before Judge James D. Whittemore. Signed by Magistrate Judge Anthony E. Porcelli on 3/20/2014. (LV) (Entered: 03/20/2014)
03/21/2014	19	ORDER granting 13 Motion to Modify Conditions of Release as to Nova A. Montgomery PROVIDED that the defendant provide her new residence information to the Clerk of Court and the United States Attorney(1). Signed by Magistrate Judge Thomas G. Wilson on 3/21/2014. (CAW) (Entered: 03/21/2014)
03/25/2014		***PRO HAC VICE FEES paid and Special Admission Attorney Certification Form filed by attorney Lowell H. Becraft, Jr. appearing on behalf of Nova A. Montgomery (Filing fee $10 receipt number TPA022584.) Related document: 12 MOTION for Lowell Becraft to appear pro hac vice *without local counsel* (AG)

		(Entered: 03/26/2014)
04/03/2014	20	ORDER IN RE: CRIMINAL STATUS CONFERENCES SCHEDULED FOR APRIL 10, 2014 as to Nova A. Montgomery. Signed by Judge James D. Whittemore on 4/3/2014. (AO) (Entered: 04/03/2014)
04/09/2014	21	WAIVER of speedy trial through Sept. 1, 2014 by Nova A. Montgomery (Becraft, Lowell) (Entered: 04/09/2014)
04/10/2014	22	First MOTION to continue trial by Nova A. Montgomery. (Becraft, Lowell) (Entered: 04/10/2014)
04/10/2014	23	Minute Entry for proceedings held before Judge James D. Whittemore: STATUS Conference as to Nova A. Montgomery held on 4/10/2014. Court Reporter: Lynann Nicely (AO) (Entered: 04/11/2014)
04/14/2014	24	ORAL ORDER granting 22 Motion to continue trial as to Nova A. Montgomery (1) Jury Trial set during the trial term commencing August 4, 2014. Status Conference set for 6/5/2014 at 01:30 PM in Tampa Courtroom 13 B before Judge James D. Whittemore. By Judge James D. Whittemore on 4/10/2014. (AO) (Entered: 04/14/2014)
04/21/2014	25	NOTICE *of Local Counsel* by Nova A. Montgomery (Becraft, Lowell) (Entered: 04/21/2014)
05/30/2014	26	ORDER IN RE: CRIMINAL STATUS CONFERENCES SCHEDULED FOR JUNE 5, 2014 AT 1:30 PM as to Nova A. Montgomery. Signed by Judge James D. Whittemore on 5/30/2014. (AO) (Entered: 05/30/2014)
06/05/2014	27	Minute Entry for proceedings held before Judge James D. Whittemore: STATUS Conference as to Nova A. Montgomery held on 6/5/2014. Court Reporter: Lynann Nicely (CLM) (Entered: 06/05/2014)
06/05/2014	28	NOTICE OF HEARING as to Nova A. Montgomery: Status Conference set for 8/7/2014 at 01:30 PM in Tampa Courtroom 13B before Judge James D. Whittemore (CLM) Modified on 6/5/2014 (CLM). (Entered: 06/05/2014)
06/10/2014	29	Unopposed MOTION to continue trial *with speedy trial waiver* by Nova A. Montgomery. (Attachments: # 1 Affidavit speedy trial waiver)(Becraft, Lowell) (Entered: 06/10/2014)
06/10/2014	30	Unopposed MOTION to Travel *outside district* by Nova A. Montgomery. (Becraft, Lowell) Motions referred to Magistrate Judge Anthony E. Porcelli. (Entered: 06/10/2014)
06/16/2014	31	ORDER granting 30 Motion to Travel to Northern District periodically to confer with counsel provided she gives Pre-Trial Services three-days notice of travel plans as to Nova A. Montgomery (1). Signed by Magistrate Judge Thomas G. Wilson on 6/16/2014. (CAW) (Entered: 06/16/2014)

06/16/2014	32	ORDER granting 29 Motion to continue trial as to Nova A. Montgomery. Jury Trial set for 9/29/2014 at 8:45 AM in Tampa Courtroom 1 B before Judge James D. Whittemore. Status Conference set for 8/7/2014 at 1:30 PM in Tampa Courtroom 13B before Judge James D. Whittemore. Signed by Judge James D. Whittemore on 6/16/2014. (KE) (Entered: 06/16/2014)
07/22/2014	33	SUPERSEDING INDICTMENT returned in open court as to Nova A. Montgomery (1) count(s) 1s-5s, 6s-10s. (BES) (Entered: 07/23/2014)
07/24/2014	34	NOTICE OF HEARING as to Nova A. Montgomery: Arraignment on Superseding Indictment set for 8/5/2014 at 10:00 AM in Tampa Courtroom 10 A before Magistrate Judge Anthony E. Porcelli. (waiver of presence at arraignment can be filed)(LV) (Entered: 07/24/2014)
07/30/2014	35	ORDER IN RE: CRIMINAL STATUS CONFERENCES SCHEDULED FOR AUGUST 7, 2014 AT 1:30 PM as to Nova A. Montgomery. Signed by Judge James D. Whittemore on 7/30/2014. (AO) (Entered: 07/30/2014)
07/30/2014	36	MOTION for miscellaneous relief, specifically waive arraignment *to superceding indictment* by Nova A. Montgomery. (Becraft, Lowell) (Entered: 07/30/2014)
07/31/2014	37	ENDORSED ORDER REFERRING: 36 MOTION to waive arraignment *to superceding indictment*. Signed by Judge James D. Whittemore on 7/31/2014. (KE) Motions referred to Magistrate Judge Anthony E. Porcelli. (Entered: 07/31/2014)
07/31/2014	38	ENDORSED ORDER granting 36 Motion waiver of presence at arraignment and entry of not guilty plea as to Nova A. Montgomery (1). Signed by Magistrate Judge Anthony E. Porcelli on 7/31/2014. (LV) (Entered: 07/31/2014)
07/31/2014	39	ACCEPTANCE OF WAIVER of defendant's presence at arraignment as to Nova A. Montgomery. Signed by Magistrate Judge Anthony E. Porcelli on 7/31/2014. (LV) (Entered: 07/31/2014)
08/07/2014	40	Minute Entry for proceedings held before Judge James D. Whittemore: STATUS Conference as to Nova A. Montgomery held on 8/7/2014. Court Reporter: Lynann Nicely (AO) (Entered: 08/08/2014)
08/07/2014	41	ORAL MOTION to continue trial by Nova A. Montgomery. (AO) (Entered: 08/08/2014)
08/07/2014	42	ORAL ORDER granting 41 Motion to continue trial as to Nova A. Montgomery (1). Jury Trial set for 10/6/2014 at 08:45 AM; Status Conference set for 9/4/2014 at 01:30 PM in Tampa Courtroom 13 B before Judge James D. Whittemore. By Judge James D. Whittemore on 8/7/2014. (AO) (Entered: 08/08/2014)

09/02/2014	43	ORDER IN RE: CRIMINAL STATUS CONFERENCES SCHEDULED FOR SEPTEMBER 4, 2014 AT 1:30 PM as to Nova A. Montgomery. Signed by Judge James D. Whittemore on 9/2/2014. (AO) (Entered: 09/02/2014)
09/02/2014	44	MOTION for miscellaneous relief, specifically Telephonic conference *for status conference* by Nova A. Montgomery. (Becraft, Lowell) (Entered: 09/02/2014)
09/02/2014	45	ENDORSED ORDER granting 44 Motion to attend 9/4/14 status conference telephonically as to Nova A. Montgomery. Attorney Becraft is directed to immediately contact the Courtroom Deputy (813-301-5886) and provide the phone number where he can be reached, directly, at the time of the hearing. Signed by Judge James D. Whittemore on 9/2/2014. (KE) (Entered: 09/02/2014)
09/04/2014	46	Minute Entry for proceedings held before Judge James D. Whittemore: STATUS Conference as to Nova A. Montgomery held on 9/4/2014. Court Reporter: Lynann Nicely (AO) (Entered: 09/04/2014)
09/08/2014	47	TRIAL CALENDAR for trial term commencing October 6, 2014 as to Nova A. Montgomery. Jury Trial set for 10/6/2014 at 08:45 AM in Tampa Courtroom 13 B before Judge James D. Whittemore. Signed by Judge James D. Whittemore on 9/8/2014. (AO) (Entered: 09/08/2014)
09/30/2014	48	NOTICE OF HEARING as to Nova A. Montgomery: Jury Trial set for 10/6/2014 at 08:45 AM in Tampa Courtroom 13 B before Judge James D. Whittemore. (AO) (Entered: 09/30/2014)
09/30/2014	49	Proposed Jury Instructions by Nova A. Montgomery (Becraft, Lowell) (Entered: 09/30/2014)
09/30/2014	50	Proposed Jury Instructions by USA as to Nova A. Montgomery (Bini, Mark) (Entered: 09/30/2014)
09/30/2014	51	PROPOSED verdict form filed by USA as to Nova A. Montgomery (Bini, Mark) (Entered: 09/30/2014)
10/02/2014	52	MOTION to allow electronic equipment, specifically Laptop computer and cellular telephone by USA as to Nova A. Montgomery. (Bini, Mark) (Entered: 10/02/2014)
10/02/2014	53	PROPOSED Voir Dire by USA as to Nova A. Montgomery (Bini, Mark) (Entered: 10/02/2014)
10/03/2014	54	WITNESS LIST by USA as to Nova A. Montgomery (Bini, Mark) (Entered: 10/03/2014)
10/03/2014	55	EXHIBIT LIST by USA as to Nova A. Montgomery (Bini, Mark) (Entered: 10/03/2014)
10/03/2014	56	ORDER granting in part and denying in part 52 motion to allow electronic equipment. Signed by Judge James D. Whittemore on 10/3/2014. (KE) (Entered:

		10/03/2014)
10/03/2014	57	EXHIBIT LIST by Nova A. Montgomery (Becraft, Lowell) (Entered: 10/03/2014)
10/05/2014	58	EXHIBIT LIST by USA as to Nova A. Montgomery (Bini, Mark) (Entered: 10/05/2014)
10/06/2014	59	MOTION in Limine *to preclude improper legal arguments* by USA as to Nova A. Montgomery. (Bini, Mark) (Entered: 10/06/2014)
10/06/2014	60	MOTION for Reconsideration re 59 MOTION in Limine *to preclude improper legal arguments* filed by USA by Nova A. Montgomery. (Becraft, Lowell) (Entered: 10/06/2014)
10/06/2014	63	Minute Entry for proceedings held before Judge James D. Whittemore: Jury Selection and Trial - DAY 1, held on 10/6/2014 as to Nova A. Montgomery. Court Reporter: Lynann Nicely (AO) (Entered: 10/07/2014)
10/06/2014	64	ORAL ORDER provisionally granting 59 Motion in Limine as to Nova A. Montgomery (1). By Judge James D. Whittemore on 10/6/2014. (AO) (Entered: 10/07/2014)
10/06/2014	65	ORAL MOTION to allow electronic equipment, specifically laptop computer by Nova A. Montgomery. (AO) (Entered: 10/07/2014)
10/06/2014	66	ORAL ORDER granting 65 motion to allow electronic equipment as to Nova A. Montgomery (1). By Judge James D. Whittemore on 10/6/2014. [Written Order to follow] (AO) (Entered: 10/07/2014)
10/07/2014	61	SUPPLEMENTAL Proposed Jury Instructions by USA as to Nova A. Montgomery (Bini, Mark) (Entered: 10/07/2014)
10/07/2014	62	ORDER allowing defense counsel to bring laptop into courthouse. Signed by Judge James D. Whittemore on 10/6/2014. (KE) (Entered: 10/07/2014)
10/07/2014		Sealed Document S-68. (AMD) (Entered: 10/08/2014)
10/07/2014	69	Minute Entry for proceedings held before Judge James D. Whittemore: JURY TRIAL - DAY 2 as to Nova A. Montgomery held on 10/7/2014. Court Reporter: Lynann Nicely (AO) (AO). (Entered: 10/08/2014)
10/08/2014	67	SECOND AMENDED EXHIBIT LIST by USA as to Nova A. Montgomery (Bini, Mark) (Entered: 10/08/2014)
10/08/2014	70	Minute Entry for proceedings held before Judge James D. Whittemore: JURY TRIAL - DAY 3 as to Nova A. Montgomery held on 10/8/2014. Court Reporter: Lynann Nicely (AO) (Entered: 10/09/2014)
10/09/2014	71	Minute Entry for proceedings held before Judge James D. Whittemore: JURY TRIAL - DAY 4 as to Nova A. Montgomery held on 10/9/2014. Court Reporter:

		Lynann Nicely (AO) (Entered: 10/10/2014)
10/09/2014	72	ORAL ORDER denying as moot 60 Motion to Reconsider Motion in Limine as to Nova A. Montgomery (1). By Judge James D. Whittemore on 10/9/2014. (AO) (Entered: 10/10/2014)
10/10/2014	73	AMENDED ORDER Setting Conditions of Release as to Nova A. Montgomery (1) Appearance Bond. Signed by Judge James D. Whittemore on 10/10/2014. (AO) (Entered: 10/10/2014)
10/10/2014	74	Minute Entry for proceedings held before Judge James D. Whittemore: JURY TRIAL - DAY 5 as to Nova A. Montgomery held on 10/10/2014. Court Reporter: Lynann Nicely (AO) (Entered: 10/14/2014)
10/10/2014	75	JURY VERDICT as to Nova A. Montgomery (1) Guilty on Count 1s through 10s, of the Superseding Indictment. (AO) (Entered: 10/14/2014)
10/10/2014	76	TRIAL EXHIBIT LIST by USA as to Nova A. Montgomery. (AO) (Entered: 10/14/2014)
10/10/2014	77	TRIAL EXHIBIT LIST by Nova A. Montgomery. (AO) (Entered: 10/14/2014)
10/10/2014	78	COURT'S TRIAL EXHIBIT LIST as to Nova A. Montgomery. (AO) (Entered: 10/14/2014)
10/10/2014	79	COURT'S JURY INSTRUCTIONS as to Nova A. Montgomery. (AO) (Entered: 10/14/2014)
10/14/2014	80	NOTICE OF HEARING as to Nova A. Montgomery: Sentencing set for 1/12/2015 at 01:30PM in Tampa Courtroom 13 B before Judge James D. Whittemore. (AO) (Entered: 10/14/2014)
10/15/2014	81	NOTIFICATION of Exhibits to Exhibit Clerk as to Nova A. Montgomery (4 boxes of Jury Trial) (BES) (Entered: 10/16/2014)

PACER Service Center

Transaction Receipt

10/16/2014 14:55:22

PACER Login:	rw1679:3045868:0	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	8:13-cr-00178-JDW-AEP
Billable Pages:	6	**Cost:**	0.60

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:13-Cr-178-T-27AEP

NOVA A. MONTGOMERY 26 U.S.C. § 7201
26 U.S.C. § 7203

SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT ONE

(26 U.S.C. § 7201 – Tax Evasion)

During the calendar year 2002, NOVA A. MONTGOMERY, a resident of Tarpon Springs, Florida, had and received taxable income in the sum of approximately $116,000.00. Upon that taxable income, there was owing to the United States of America an income tax of approximately $29,180.00. Well knowing the foregoing facts, and failing to make an income tax return on or before April 15, 2003, as required by law, to any proper officer of the Internal Revenue Service, and pay to the Internal Revenue Service the income tax, on or about February 12, 2009,

NOVA A. MONTGOMERY,

in the Middle District of Florida, did willfully attempt to evade and defeat the income tax due and owing by her to the United States of America for the calendar year by

submitting a "zero" Form 1040 return that contained an altered Form 1099 miscellaneous income form.

In violation of Title 26, United States Code, Section 7201.

COUNT TWO

(26 U.S.C. § 7201 – Tax Evasion)

During the calendar year 2003, NOVA A. MONTGOMERY, a resident of Tarpon Springs, Florida, had and received taxable income in the sum of approximately $78,820.00. Upon that taxable income, there was owing to the United States of America an income tax of approximately $16,810.00. Well knowing the foregoing facts, and failing to make an income tax return on or before April 15, 2004, as required by law, to any proper officer of the Internal Revenue Service, and pay to the Internal Revenue Service the income tax, on or about February 12, 2009,

NOVA A. MONTGOMERY,

in the Middle District of Florida, did willfully attempt to evade and defeat the income tax due and owing by her to the United States of America for the calendar year by submitting a "zero" Form 1040 return that contained an altered Form 1099 miscellaneous income form.

In violation of Title 26, United States Code, Section 7201.

COUNT THREE

(26 U.S.C. § 7201 – Tax Evasion)

During the calendar year 2004, NOVA A. MONTGOMERY, a resident of Tarpon Springs, Florida, had and received taxable income in the sum of approximately $124,360.00. Upon that taxable income, there was owing to the United States of America an income tax of approximately $29,440.00. Well knowing the foregoing facts, and failing to make an income tax return on or before April 15, 2005, as required by law, to any proper officer of the Internal Revenue Service, and pay to the Internal Revenue Service the income tax, on or about February 12, 2009,

NOVA A. MONTGOMERY,

in the Middle District of Florida, did willfully attempt to evade and defeat the income tax due and owing by her to the United States of America for the calendar year by submitting a "zero" Form 1040 return that contained an altered Form 1099 miscellaneous income form.

In violation of Title 26, United States Code, Section 7201.

COUNT FOUR

(26 U.S.C. § 7201 – Tax Evasion)

During the calendar year 2005, NOVA A. MONTGOMERY, a resident of Tarpon Springs, Florida, had and received taxable income in the sum of approximately $124,220.00. Upon that taxable income, there was owing to the

United States of America an income tax of approximately $29,280.00. Well knowing knowing the foregoing facts, and failing to make an income tax return on or before April 17, 2006, as required by law, to any proper officer of the Internal Revenue Service, and pay to the Internal Revenue Service the income tax, on or about February 12, 2009,

NOVA A. MONTGOMERY,

in the Middle District of Florida, did willfully attempt to evade and defeat the income tax due and owing by her to the United States of America for the calendar year by submitting a "zero" Form 1040 return that contained an altered Form 1099 miscellaneous income form.

In violation of Title 26, United States Code, Section 7201.

COUNT FIVE

(26 U.S.C. § 7201 – Tax Evasion)

During the calendar year 2006, NOVA A. MONTGOMERY, a resident of Tarpon Springs, Florida, had and received taxable income in the sum of approximately $169,040.00. Upon that taxable income, there was owing to the United States of America an income tax of approximately $42,375.00. Well knowing the foregoing facts, and failing to make an income tax return on or before April 16, 2007, as required by law, to any proper officer of the Internal Revenue Service, and pay to the Internal Revenue Service the income tax, on or about February 12, 2009,

NOVA A. MONTGOMERY,

in the Middle District of Florida, did willfully attempt to evade and defeat the income tax due and owing by her to the United States of America for the calendar year by submitting a "zero" Form 1040 return that contained an altered Form 1099 miscellaneous income form.

In violation of Title 26, United States Code, Section 7201.

COUNT SIX

(26 U.S.C. § 7203 – Failure to File a Tax Return)

During the calendar year 2008,

NOVA A. MONTGOMERY,

the defendant herein, was a resident of Tarpon Springs, Florida, and had received gross income in excess of $8,950. By reason of such gross income, she was required by law, following the close of calendar year 2008 and on or before April 15, 2009, to make an income tax return to the Internal Revenue Service Center at Atlanta, Georgia, to a person assigned to receive returns at the local office of the Internal Revenue Service at Tampa, Florida, or to another Internal Revenue Service office permitted by the Commissioner of Internal Revenue, stating specifically the items of her gross income and any deductions and credits to which she was entitled. Well knowing and believing the foregoing, she did willfully fail, on or about April 15, 2009, in the Middle District of Florida and elsewhere, to make an income tax return.

In violation of Title 26, United States Code, Section 7203.

COUNT SEVEN

(26 U.S.C. § 7203 – Failure to File a Tax Return)

During the calendar year 2009,

NOVA A. MONTGOMERY,

the defendant herein, was a resident of Tarpon Springs, Florida, and had received gross income in excess of $9,350. By reason of such gross income, she was required by law, following the close of calendar year 2009 and on or before April 15, 2010, to make an income tax return to the Internal Revenue Service Center at Atlanta, Georgia, to a person assigned to receive returns at the local office of the Internal Revenue Service at Tampa, Florida, or to another Internal Revenue Service office permitted by the Commissioner of Internal Revenue, stating specifically the items of her gross income and any deductions and credits to which she was entitled. Well knowing and believing the foregoing, she did willfully fail, on or about April 15, 2010, in the Middle District of Florida and elsewhere, to make an income tax return.

In violation of Title 26, United States Code, Section 7203.

COUNT EIGHT

(26 U.S.C. § 7203 – Failure to File a Tax Return)

During the calendar year 2010,

NOVA A. MONTGOMERY,

the defendant herein, was a resident of Tarpon Springs, Florida, and had received gross income in excess of $9,350. By reason of such gross income, she was

required by law, following the close of calendar year 2010 and on or before April 18, 2011, to make an income tax return to the Internal Revenue Service Center at Atlanta, Georgia, to a person assigned to receive returns at the local office of the Internal Revenue Service at Tampa, Florida, or to another Internal Revenue Service office permitted by the Commissioner of Internal Revenue, stating specifically the items of her gross income and any deductions and credits to which she was entitled. Well knowing and believing the foregoing, she did willfully fail, on or about April 15, 2011, in the Middle District of Florida and elsewhere, to make an income tax return.

In violation of Title 26, United States Code, Section 7203.

COUNT NINE

(26 U.S.C. § 7203 – Failure to File a Tax Return)

During the calendar year 2011,

NOVA A. MONTGOMERY,

the defendant herein, was a resident of Tarpon Springs, Florida, and had received gross income in excess of $9,500. By reason of such gross income, she was required by law, following the close of calendar year 2011 and on or before April 17, 2012, to make an income tax return to the Internal Revenue Service Center at Atlanta, Georgia, to a person assigned to receive returns at the local office of the Internal Revenue Service at Tampa, Florida, or to another Internal Revenue Service office permitted by the Commissioner of Internal Revenue, stating specifically the items of her gross income and any deductions and credits to which she was entitled.

Well knowing and believing the foregoing, she did willfully fail, on or about April 15, 2012, in the Middle District of Florida and elsewhere, to make an income tax return.

In violation of Title 26, United States Code, Section 7203.

COUNT TEN

(26 U.S.C. § 7203 – Failure to File a Tax Return)

During the calendar year 2012,

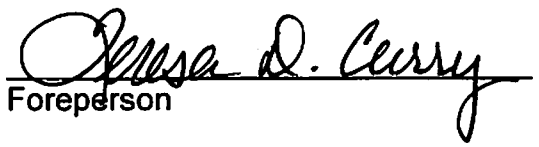
NOVA A. MONTGOMERY,

the defendant herein, was a resident of Tarpon Springs, Florida, and had received gross income in excess of $9,750. By reason of such gross income, she was required by law, following the close of calendar year 2012 and on or before April 15, 2013, to make an income tax return to the Internal Revenue Service Center at Atlanta, Georgia, to a person assigned to receive returns at the local office of the Internal Revenue Service at Tampa, Florida, or to another Internal Revenue Service office permitted by the Commissioner of Internal Revenue, stating specifically the items of her gross income and any deductions and credits to which she was entitled.

Well knowing and believing the foregoing, she did willfully fail, on or about April 15, 2013, in the Middle District of Florida and elsewhere, to make an income tax return.

In violation of Title 26, United States Code, Section 7203.

A TRUE BILL,

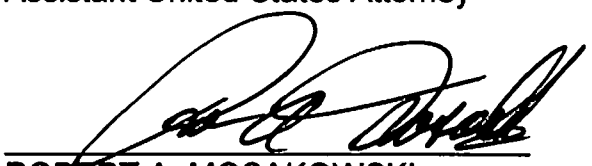


Foreperson

A. LEE BENTLEY, III
United States Attorney

By: 

MARK E. BINI
Assistant United States Attorney

By: 

ROBERT A. MOSAKOWSKI
Assistant United States Attorney
Chief, Economic Crimes Section

UNITED STATES DISTRICT COURT
Middle District of Florida
Tampa Division

THE UNITED STATES OF AMERICA

vs.

NOVA A. MONTGOMERY

SUPERSEDING INDICTMENT

Violations:

Title 26, United States Code, Section 7201
Title 26, United States Code, Section 7203

A true bill,

Teresa D. Curry
Foreperson

Filed in open court this 22nd day

of July 2014.

Clerk

Bail $_____

FILED
2014 JUL 22 PM 2:22
CLERK US DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA FLORIDA

GPO 863 525

f_Superseding Indictment Back.docx

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

v. Case No. 8:13-cr-178-JDW

NOVA MONTGOMERY,

Defendant.

DEFENDANT'S REQUESTED JURY INSTRUCTIONS

Comes now the defendant, Nova Montgomery, through her undersigned counsel, and hereby submits to this Honorable Court the following Defendant's Requested Jury Instructions which she asks that the Court give during its charge to the jury in this case. Montgomery further requests that she be allowed to submit any additional requested instructions for any other issues that might arise during trial.

Respectfully submitted this the 30th day of September, 2014.

Local counsel:
Lisset Gonzalez Hanewicz
Gonzalez Hanewicz Law, PLLC
P.O. Box 7474
St. Petersburg, FL 33734
727-914-4070
lisset@thelawyersolution.com

/s/ Lowell H. Becraft, Jr.
Lowell H. Becraft, Jr.
ASB 5005-F66L
Attorney for Defendant Montgomery
403-C Andrew Jackson Way
Huntsville, AL 35801
256-533-2535
becraft@hiwaay.net

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 1

Duty To Follow Instructions
Presumption Of Innocence

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or to produce any evidence at all. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find that Defendant not guilty.

Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 2.1 (2003). See also *Coffin v. United States*, 156 U.S. 432, 15 S.Ct. 394 (1895).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 2

Presumption of Innocence, Burden of Proof

As you know, the defendant has pleaded not guilty to the crime charged in the indictment. The indictment is not any evidence at all of guilt. It is just the formal way that the government tells the defendant what crime he or she is accused of committing. It does not even raise any suspicion of guilt.

Instead, the defendant starts the trial with a clean slate, with no evidence at all against her, and the law presumes that she is innocent. This presumption of innocence stays with her unless the government presents evidence here in court that overcomes the presumption, and convinces you beyond a reasonable doubt that she is guilty.

This means that the defendant has no obligation to present any evidence at all, or to prove to you in any way that she is innocent. It is up to the government to prove that she is guilty, and this burden stays on the government from start to finish. You must find the defendant not guilty unless the government convinces you beyond a reasonable doubt that she is guilty.

The government must prove every element of the crime charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not

reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence.

Sixth Circuit Pattern Criminal Jury Instructions 1.03 (extract).

The defense objects to the following in the 11th Circuit Pattern Jury Instructions (Criminal Cases) Basic Instruction 3 (2003):

> "Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs."

Authority exists criticizing that part of the above instruction that suggests an analogy to the jurors' "most important decisions in your own lives". See *Victor v. Nebraska*, 511 U.S. 1, 24, 114 S.Ct. 1239 (1994)(Ginsburg, J., concurring)("In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives choosing a spouse, a job, a place to live, and the like generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases."); *Scury v. United States*, 347 F.2d 468, 470 (D.C. Cir. 1965)("A prudent person called upon to act in an important business or family matter would certainly gravely weight the often neatly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary."); *Commonwealth v. Ferreira*, 373 Mass. 116, 364 N.E.2d 1264, 1274 (1977); *Dunn v. Perrin*, 570 F.2d 21, 24 (1st Cir. 1978); *United States v. Noone*, 913 F.2d 20, 28-29 (1st Cir. 1990); *United States v. Colon-Pagan*, 1 F.3d 80, 81 (1st Cir. 1993); and *Vargas v. Keane*, 86 F.3d 1273, 1279 (2nd Cir. 1996)(noting debate about the matter).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 3

Reasonable Doubt Defined

An abiding conviction based on proof beyond a reasonable doubt is the highest level of certainty recognized in the law. It requires a greater degree of certainty than is necessary to form a strong and convincing belief. It also requires a greater degree of certainty than the next lower standard of "clear and convincing evidence." The clear and convincing standard requires evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. To be clear and convincing, the evidence must be so clear as to leave no substantial doubt and be sufficiently strong to command the unhesitating assent of every reasonable mind. Again, the proof beyond a reasonable doubt standard requires a greater degree of certainty than that required to meet the clear and convincing evidence standard.

Authority: This is an instruction advocated by JuryInstruction.Com, posted at: http://www.juryinstruction.com/article_section/articles/article_archive/article06.htm.

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 4

Reasonable Doubt Defined

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves your minds in that condition that you cannot say you have an abiding conviction of the truth of the charge to a near certainty.

OR

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt to a near certainty. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced to a near certainty that the defendant is guilty of the crime charged, you must find her guilty. If, on the other hand, you think there is a reasonable possibility that she is not guilty, you must give her the benefit of the doubt and find her not guilty.

Authority: This instruction is advocated by JuryInstruction.Com, posted at: http://www.juryinstruction.com/article_section/articles/article_archive/article07.htm See *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); *Victor v. Nebraska*, 511 U.S. 1, 15 (1994); and *United States v. Hernandez*, 176 F.3d 719, 731 (3rd Cir. 1999).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 5

Evenly Balanced Evidence

The line between honest belief and purposeful misrepresentation, dishonesty, and deceit is not always clear. Since the defendant's guilt or innocence depends upon where that line is drawn, however, you may not convict if the evidence is evenly balanced between guilt and innocence.

OR

So if you, after careful and impartial consideration of all the evidence in the case, have a reasonable doubt that the defendant is guilty of the charge, you must acquit. If you view the evidence in the case a reasonably permitting either of two conclusions one of innocence, the other of guilt you should, of course, adopt the conclusion of innocence.

See *United States v. Andujar*, 49 F.3d 16, 20 (1st Cir. 1995); *United States v. Martin*, 228 F.3d 1, 10 (1st Cir. 2000); *United States v. Cianci*, 378 F.3d 71, 98 (1st Cir. 2004); *United States v. D'Amato*, 39 F.3d 1249, 1256 (2nd Cir. 1994); *United States v. Glenn*, 312 F.3d 58, 70 (2nd Cir. 2002); *United States v. Lorenzo*, 534 F.3d 153, 159 (2nd Cir. 2008); *Clark v. Procunier*, 755 F.2d 394, 396 (5th Cir. 1985); *United States v. Delay*, 440 F.2d 566, 568 (7th Cir. 1971); *United States v. Harris*, 942 F.2d 1125, 1129-30 (7th Cir. 1991); *United States v. Hepp*, 656 F.2d 350, 353 (8th Cir. 1981); *United States v. Wright*, 835 F.2d 1245, 1249 n. 1 (8th Cir. 1987); *Cosby v. Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982); and *United States v. Andrews*, 850 F.2d 1557, 1572 (11th Cir. 1988).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 6

Meaning of "Not Guilty"

You will note that as to each count there are two possible verdicts: "not guilty" or "guilty." These verdicts should reflect your decision as to whether or not the prosecution has proven the defendant guilty beyond a reasonable doubt. The "guilty" verdict is for use when the prosecution has proven guilt beyond a reasonable doubt and the "not guilty" verdict is for use when the prosecution has not proven guilt beyond a reasonable doubt. It is not necessary for you to conclude that the defendant is factually innocent in order to return a "not guilty" verdict. Such a verdict only means that the prosecution has not met its burden of proving the defendant guilty beyond a reasonable doubt.

Authority: This instruction is advocated by JuryInstruction.Com, posted at:

http://juryinstruction.com/article_section/articles/article_archive/article10.htm

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 7

Consideration Of The Evidence
Direct And Circumstantial
Argument Of Counsel

As I said earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Eleventh Circuit Pattern Jury Instructions (Criminal Cases) Basic Instruction 4.1 (2003).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 8

Consideration Of The Evidence, Direct
And Circumstantial – Argument Of Counsel
Comments By The Court

As I said earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Eleventh Circuit Pattern Jury Instructions (Criminal Cases) Basic Instruction 4.2 (2003).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 9

Credibility Of Witnesses

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

Eleventh Circuit Pattern Jury Instructions (Criminal Cases) Basic Instruction 5 (2003).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 10

Impeachment
Inconsistent Statement
(Defendant Testifies With No Felony Conviction)

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact; or, whether there was evidence that at some other time a witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

The Defendant has a right not to testify. If she does testify, however, you should decide in the same way as that of any other witness whether you believe her testimony.

Eleventh Circuit Pattern Jury Instructions (Criminal Cases) Basic Instruction 6.3 (2003).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 11

Expert Witnesses

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters.

Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Eleventh Circuit Pattern Jury Instructions (Criminal Cases) Basic Instruction 7 (2003).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 12

Number of Witnesses

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

Seventh Circuit Pattern Criminal Federal Jury Instruction No. 1.09 (1998).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 13

The Government as a Party

You are to perform the duty of finding the facts without bias or prejudice as to any party. You are to perform your final duty in an attitude of complete fairness and impartiality. The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to litigation. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals under the laws.

L. Sand, T. Siffert, W. Loughlin & S. Weiss, Modern Federal Jury Instructions, ¶ 2.01, at No. 2-5, ¶ (1993) (adapted).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 14

Improper Considerations

Your verdict must be based solely upon the evidence developed at trial or the lack of evidence.

It would be improper for you to consider, in reaching your decision as to whether the government sustained its burden of proof, any personal feelings you may have about the defendant's race, religion, national origin, sex, or age. All persons are entitled to the presumption of innocence.

It would be equally improper for you to allow any feelings you might have about the nature of the crime charged to interfere with your decision-making process.

To repeat, your verdict must be based exclusively upon the evidence or lack of evidence in the case.

L. Sand, T. Siffert, W. Loughlin & S. Weiss, Modern Federal Jury Instructions, ¶ 2.01, at No. 2-6, ¶ (1993) (adapted).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 15

Caution – Punishment
(Single Defendant – Multiple Counts)

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the Defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any other offense charged.

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether the Defendant is guilty or not guilty. The Defendant is on trial only for those specific offenses alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the Defendant is convicted, the matter of punishment is for the Judge alone to determine later.

Eleventh Circuit Pattern Jury Instructions (Criminal Cases) Basic Instruction 10.2 (2003).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 16

Guilt by Association

There is a long-standing rule against "guilt by association." A defendant may not be convicted merely because people who worked with her committed criminal conduct. In this case, the defendant cannot be convicted simply because she was associated with or friendly with anyone you may find to have acted in violation of the law. Each element of each offense must be proved independently against the defendant individually on the basis of her own conduct and state of mind.

See *United States v. Romo*, 669 F.2d 285, 288 (5th Cir. 1982); *United States v. Turcotte*, 515 F.2d 145, 152 (2nd Cir. 1975)(cross-examination of a defendant regarding conviction of friend held properly excluded by trial court); *United States v. Gosser*, 339 F.2d 102, 112 (6th Cir. 1964)(defendant's credibility as a witness could not be "attacked by evidence of prior arrests without convictions or association with convicted felons or gamblers."); and *United States v. Crawford*, 438 F.2d 441 (8th Cir. 1971) (cross-examination of a defendant charged with the sale of cocaine and heroin as to his association with convicted narcotics felons was reversible error).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 17

Activities Not Charged

You are here only to determine whether the defendant is guilty or not guilty of the charges in the indictment. The defendant is not on trial for any conduct or offense not charged in the indictment.

Ninth Circuit Model Criminal Jury Instructions 3.10.

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 18

Law Enforcement Witnesses

Because a particular witness may be a law enforcement officer such as an investigator, a FBI agent, or for that matter an employee of any other government agency, that does not mean that his or her testimony is deserving of any special consideration or any greater weight by reason of that fact.

It is quite legitimate for counsel to attack or question the credibility of an agent or other government employee on the ground that his or her testimony may be colored by personal or professional interest in the outcome of the case.

See *Bush v. United States*, 375 F.2d 602 (D.C. Cir. 1967).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 19

Tax Evasion:
26 U.S.C. § 7201

The defendant is charged in 5 counts of the indictment with a violation of 26 U.S.C. section 7201. This law makes it a crime for anyone willfully to attempt to evade or defeat the payment of federal income tax.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant owed substantial income taxes for 2002, 2003, 2004, 2005 and 2006;

Second: the defendant intended to evade and defeat payment of that additional tax;

Third: the defendant committed an affirmative act in furtherance of this intent, that is she committed the several affirmative acts described in the 5 counts of the superceding indictment; and

Fourth: the defendant acted willfully, that is, with the voluntary intent to violate a known legal duty. To "evade and defeat" the payment of tax means to escape paying a tax due other than by lawful avoidance.

The indictment alleges a specific amount of tax due for each calendar year charged. The proof, however, need not show the exact amount of the additional tax

due. The government is required only to prove, beyond a reasonable doubt, that the additional tax due was substantial.

As has been said before, the burden is on the prosecution to prove every element of the offense charged beyond reasonable doubt. The law never imposes on the defendant in a criminal case the burden of producing any evidence or of calling any witnesses.

Tenth Circuit Pattern Criminal Jury Instruction 2.92 (as modified by inclusion of last paragraph).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 20

What Is Not Tax Evasion

The failure to act is an act of omission, and is neither an act of commission or an affirmative action.

Failing to file tax returns, failing to keep records, failing to report and failing to pay income taxes are not affirmative acts or acts of commission.

See *Sansone v. United States*, 380 U.S. 343, 351 (1964); *Lawn v. United States*, 355 U.S. 339, 361 (1958); *Spies v. United States*, 317 U.S. 492, 496 (1942); *United States v. Romano*, 938 F.2d 1569 (2nd Cir. 1991); *United States v. Tarnopol*, 561 F.2d 466, 474-75 (3rd Cir. 1977); *United States v. Doyle*, 956 F.2d 73, 75 (5th Cir. 1992); *Griffin v. United States*, 173 F.2d 909, 910 (6th Cir. 1949); *Bridgeforth v. United States*, 233 F.2d 451, 453 (6th Cir. 1956); *United States v. Mesheski*, 286 F.2d 345, 346 (7th Cir. 1961); and *United States v, Voorhies*, 658 F.2d 710, 715 (9th Cir. 1981).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 21

Failure To File Tax Return:
26 USC § 7203

Title 26, United States Code, Section 7203, makes it a Federal crime or offense for anyone to willfully fail to file a federal income tax return when required to do so by the Internal Revenue laws or regulations.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First:	That the Defendant was required by law or regulation to make a return of her income for the taxable year charged;
Second:	That the Defendant failed to file a return at the time required by law; and
Third:	That the Defendant's failure to file the return was willful.

A person is required to make a federal income tax return for any tax year in which she has gross income in excess of _____.

"Gross income" includes the following: (1) Compensation for services, including fees, commissions and similar items; (2) Gross income derived from business; (3) Gains derived from dealing in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions;

(12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.

The Defendant is a person required to file a return if the Defendant's gross income for any calendar year exceeds _____even though the Defendant may be entitled to deductions from that income in a sufficient amount so that no tax is due. So, the Government is not required to prove that a tax was due and owing, or that the Defendant intended to evade or defeat payment of taxes, only that the Defendant willfully failed to file the return.

As has been said before, the burden is on the prosecution to prove every element of the offense charged beyond reasonable doubt. The law never imposes on the defendant in a criminal case the burden of producing any evidence or of calling any witnesses.

Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 94 (2003) (as modified by inclusion of last paragraph).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 22

Good Faith Defense

To act "willfully" means to act voluntarily and intentionally in violation of a known legal duty. Mere negligence, even gross negligence, does not constitute willfulness under the criminal law. The defendant does not act willfully if she believes in good faith that she is acting within the law, or that her actions comply with the law. A good faith belief is one which is honestly and genuinely held. Therefore, if the defendant subjectively believed that what she was doing was in compliance with the tax statutes, she cannot be said to have the criminal intent required to willfully fail to file federal income tax returns. In proving willfulness, it is the government's burden to prove beyond a reasonable doubt that the defendant did not act with a good faith belief as to what the law required of her. If you find that the defendant believed in good faith she was acting in compliance with the law as to any count, you must find the defendant not guilty as to that count.

A belief need not be objectively reasonable to be held in good faith. Nevertheless, you may consider whether the defendant's stated belief about the tax statutes was reasonable as a factor in deciding whether the belief was honestly or genuinely held. In considering the defendant's good faith misunderstanding of the law, you must make your decision based upon what the defendant believed in her own

mind, and not upon what you or someone else believe or think the defendant ought to believe. Whether the defendant's beliefs about the legality of her actions were right or wrong, reasonable or unreasonable, is irrelevant to the issue of willfulness; the only issue is whether those beliefs were in fact held by the defendant.

Authority:
This instruction was given by U.S. District Judge Sam Sparks in the case of United States v. Charles Thomas Clayton, Case No. 1:06-cr-00069-SS-1, tried in the U.S. District Court for the Western District of Texas in Austin (Doc. #54).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 23

Good Faith Defense

The defendant acted "willfully" if the law imposed a duty on her, she knew of the duty, and she voluntarily and intentionally violated the duty. A defendant's conduct is not "willful" if it resulted from negligence, inadvertence, accident, mistake or reckless disregard for the requirements of the law, or resulted from a good faith misunderstanding that he was not violating a duty that the law imposed on her. If you have a reasonable doubt as to whether the defendant acted willfully, you must acquit her.

The defendant asserts she did not act willfully as charged in the Indictment. The defendant does not act "willfully" if she believes in good faith that she is acting within the law or that her actions comply with the law, even though the belief turns out to be incorrect or wrong. Having the burden to prove the defendant acted willfully as charged, the government must prove the defendant did not believe in good faith that her actions were lawful. The burden of proving good faith does not rest with the defendant because the defendant does not have an obligation to prove anything in this case. Therefore, if you find that the defendant actually believed what she was doing was in accord with the tax laws, then you must conclude that the defendant did not act willfully.

In making this determination about the defendant's good faith, you must keep the following in mind. The defendant's good-faith belief or misunderstanding of the law need not be rational or even reasonable, as long as she actually held the belief in good faith.

Excerpts from Jury Instruction 10, given by Judge Christina Armijo, in the case of United States v. Mark and Sharon Hopkins, case No. 09 cr 863, U.S. District Court for District of New Mexico.

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 24

Innocent Explanation

When there is an innocent explanation for a defendant's conduct as well as one which suggests that a defendant was engaged in wrong doing, the Government must produce evidence which would allow you, the jury, to conclude beyond a reasonable doubt that the Government's version of the defendant's conduct is the correct one.

See *United States v. Vasquez-Chan*, 978 F.2d 546, 549 (9th Cir. 1992).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 25

Not Know Law

In this case, the defendant is not presumed to know the law. For any law the Government asserts the defendant knew, the Government must prove beyond a reasonable doubt that the defendant knew it.

See *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655 (1994); *United States v. Alt*, 996 F.2d 827 (6th Cir. 1993); and *United States v. Rogers*, 18 F.3d 265 (4th Cir. 1994).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 26

Beliefs Evidencing Willfulness

To find that the defendant had a "disagreement with the law" that would be evidence of the defendant acting willfully, you the jury must find that she knew that the federal income tax laws imposed a tax on her income, and she consequently was required to file tax returns and pay income taxes.

To find that the defendant believed that the federal income tax laws were unconstitutional and thus show that the defendant was acting willfully, you the jury must find that she knew that the federal income tax laws imposed a tax on her income, and she consequently was required to file tax returns and pay income taxes.

Authority: Defense counsel.

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 27

Willful Intent

Willful intent is not presumed or assumed; it is personal and not imputed. One is chargeable with that person's own personal intent, not the intent of some other person. Bad faith is an essential element of willful intent. Good faith constitutes a complete defense to one charged with an offense of which willful intent is an essential element. One who acts with honest intention is not chargeable with willful intent. One who expresses an opinion honestly held by her, or a belief honestly entertained by her, is not chargeable with acting willfully even though such opinion is erroneous and such belief is a mistaken belief. Evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish such intent. In order to establish willful intent on the part of a person, it must be established that such person knowingly and intentionally attempted to violate the tax laws.

The above is a modification of a similar instruction regarding fraudulent intent approved in *United States v. Ammons*, 464 F.2d 414, 417 (8th Cir. 1972). See also *United States v. Casperson*, 773 F.2d 216, 223 (8th Cir. 1985), and *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991).

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 28

Rely on Courts

In forming opinions and beliefs regarding one's liability for income tax, the requirement for one to make certain returns, pay taxes, and any other aspect of income tax law, a person may rely upon decisions of the United States Supreme Court and other courts.

See *United States v. Bishop*, 412 U.S. 346, 361, 93 S.Ct. 3008 (1973)("The requirement of an offense committed 'willfully' is not met, therefore, if a taxpayer has relied in good faith on a prior decision of this Court.").

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 29

Rely on Courts

In relying upon opinions of the U.S. Supreme Court in reference to tax matters, a person can reach certain conclusions and beliefs regarding her liability for a tax and the applications of tax law to her. If she does rely upon U.S. Supreme Court opinions, she is not acting "willfully" within the meaning of the law that the defendant is charged with having violated. This is so even if she misinterprets or misunderstands such opinions.

See *United States v. Bishop*, 412 U.S. 346, 361, 93 S.Ct. 3008 (1973).

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 30

Rely on Government Documents

An American citizen such as the defendant has a right to rely upon representations and statements made by the government and appearing in official publications or documents.

See *Raley v. Ohio*, 360 U.S. 423, 438, 79 S.Ct. 1257, 1266 (1959); *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476 (1965); and *United States v. Laub*, 385 U.S. 475, 87 S.Ct. 574 (1967).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 31

Section 6001 of the Internal Revenue Code reads as follows:

"Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns and comply with such rules and regulations as the Secretary may from time to time prescribe."

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 32

Section 6011 of the Internal Revenue Code reads as follows:

"When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary."

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 33

Theory of Defense

If upon consideration of all the evidence you are left with a reasonable doubt whether the defendant believed in good faith that for the year 2002 her income was not taxable, it shall be your duty to acquit her for count 1 of the indictment.

If upon consideration of all the evidence you are left with a reasonable doubt whether the defendant believed in good faith that for the year 2003 her income was not taxable, it shall be your duty to acquit her for count 2 of the indictment.

If upon consideration of all the evidence you are left with a reasonable doubt whether the defendant believed in good faith that for the year 2004 her income was not taxable, it shall be your duty to acquit her for count 3 of the indictment.

If upon consideration of all the evidence you are left with a reasonable doubt whether the defendant believed in good faith that for the year 2005 her income was not taxable, it shall be your duty to acquit her for count 4 of the indictment.

If upon consideration of all the evidence you are left with a reasonable doubt whether the defendant believed in good faith that for the year 2006 her income was not taxable, it shall be your duty to acquit her for count 5 of the indictment.

If upon consideration of all the evidence you are left with a reasonable doubt whether the defendant believed in good faith that for the years 2008 through 2012 her income was not taxable and she was not required to file income tax returns for these

years, it shall be your duty to acquit her for counts 6 through 10 of the indictment.

See *United States v. Opdahl*, 930 F.2d 1530, 1533 (11th Cir. 1991).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 34

Duty To Deliberate

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges – judges of the facts. Your only interest is to seek the truth from the evidence in the case.

Eleventh Circuit Pattern Jury Instructions (Criminal Cases) Basic Instruction 11 (2003).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 35

Verdict

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

[Explain verdict]

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

Eleventh Circuit Pattern Jury Instructions (Criminal Cases) Basic Instruction 12 (2003).

CERTIFICATE OF SERVICE

I hereby certify that on this date, September 30, 2014, I electronically transmitted this motion to the Clerk of the Court using the CM/ECF system for filing, which will send notification of such filing to the following:

Mark E. Bini & Robert Monk
US Attorney's Office - FLM
400 N. Tampa St., Suite 3200
Tampa, FL 33602

/s/ *Lowell H. Becraft, Jr.*
Lowell H. Becraft, Jr.

bvgdsUNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:13-CR-178-T-27AEP

NOVA A. MONTGOMERY

PROPOSED JURY INSTRUCTIONS

The United States of America, by A. Lee Bentley, III, United States Attorney for the Middle District of Florida, requests that the following jury instructions be given during the Court's charge at the end of the trial of the above-named Superseding Indictment.

Respectfully submitted,

A. LEE BENTLEY, III
United States Attorney

By: *s/ Mark E. Bini*
MARK E. BINI
Assistant United States Attorney
AUSA No. 130
400 N. Tampa Street, Suite 3200
Tampa, Florida 33602-4798
Telephone: (813) 274-6000
Facsimile: (813) 274-6358
E-mail: Mark.Bini@usdoj.gov

U.S. v. Nova A. Montgomery Case No. 8:13-CR-178-T-27AEP

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Lowell H. Becraft, Jr., Esq.
Lisset Gonzalez Hanewicz, Esq.

s/ Mark E. Bini
MARK E. BINI
Assistant United States Attorney
400 N. Tampa Street, Suite 3200
Tampa, Florida 33602-4798
Telephone: (813) 274-6000
Facsimile: (813) 274-6358
E-mail: Mark.Bini@usdoj.gov

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions – what we call your deliberations.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find the Defendant guilty of the crime charged in the Superseding Indictment.

2.1
Duty To Follow Instructions
Presumption Of Innocence

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or to produce any evidence at all. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find that Defendant not guilty.

3
Definition Of Reasonable Doubt

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that a Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

4.1
Consideration Of The Evidence
Direct And Circumstantial
Argument Of Counsel

As I said earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

5
Credibility Of Witnesses

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

6.3
Impeachment
Inconsistent Statement
(Defendant Testifies With No Felony Conviction)

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact; or, whether there was evidence that at some other time a witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe the Defendant's testimony.

7
Expert Witnesses

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters.

Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

MDFL Special 2c
Intentional Flight

Intentional flight by a person after a crime has been committed is not, of course, sufficient in itself to establish the guilt of that person, but intentional flight under those circumstances is a fact which, if proved, may be considered by the jury in light of all the other evidence in the case in determining the guilt or innocence of that person.

Whether or not the defendant's conduct constituted flight is exclusively for you, as the jury, to determine. And if you do so determine that flight showed a consciousness of guilt on the defendant's part, the significance to be attached to that evidence is also a matter exclusively for you as a jury to determine.

I do remind you that in your consideration of any evidence of flight, if you should find that there was flight, you should consider that there may be reasons for this which are fully consistent with innocence. And, may I suggest to you that a feeling of guilt does not necessarily reflect actual guilt of a crime which you may be considering.

ANNOTATIONS AND COMMENTS

See United States v. Borders, 693 F.2d 1318, 1327-28 (11th Cir. 1982) (using this instruction, with "immediately after" language). Relying on *Borders*, the Eleventh Circuit has "consistently approved of the inclusion of a jury instruction on flight." *United States v. Blackburn*, 165 Fed. App'x. 721 (11th Cir. 2006) ("the court has the duty to instruct the jury on all issues raised during the trial" and "because the government presented evidence of flight as a theory of guilt, the court properly issued the instruction, even in the absence of the government's request") and *United States v. Simmerer*, 156 Fed. App'x 124 (11th Cir. 2005) (jury should be cautioned that "it is up to it to determine whether the evidence proves flight or what weight should be accorded to such a determination.")

4
Similar Acts Evidence
(Rule 404(b), FRE)

During the course of the trial, as you know from the instructions I gave you then, you heard evidence of acts of the Defendant which may be similar to those charged in the Superseding Indictment, but which were committed on other occasions. You must not consider any of this evidence in deciding if the Defendant committed the acts charged in the Superseding Indictment. However, you may consider this evidence for other, very limited, purposes.

If you find beyond a reasonable doubt from other evidence in this case that the Defendant did commit the acts charged in the Superseding Indictment, then you may consider evidence of the similar acts allegedly committed on other occasions to determine whether the Defendant had the state of mind or intent necessary to commit the crime charged in the Superseding Indictment.

.

5
Notetaking

In this case you have been permitted to take notes during the course of the trial, and most of you - - perhaps all of you - - have taken advantage of that opportunity and have made notes from time to time.

You will have your notes available to you during your deliberations, but you should make use of them only as an aid to your memory. In other words, you should not give your notes any precedence over your independent recollection of the evidence or the lack of evidence; and neither should you be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

8
Introduction to Offense Instructions

The Superseding Indictment charges ten separate crimes, called "counts," against the Defendant. Each count has a number. You'll be given a copy of the Superseding Indictment to refer to during your deliberations. Counts One through Five charge the Defendant with Tax Evasion. Counts Six through Ten charge the Defendant with Failure to File Tax Returns. I will explain the law governing those substantive offenses in a moment.

93.1
Tax Evasion
(General Charge)
26 USC § 7201

Counts One through Five of the Superseding Indictment charge the Defendant with tax evasion in violation of Title 26, United States Code, Section 7201. Section 7201 makes it a Federal crime or offense for anyone to willfully attempt to evade or defeat the payment of federal income taxes.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant committed an affirmative act constituting an attempt to evade or defeat a tax or the payment thereof;

Second: That an additional tax is due and owing; and

Third: The defendant acted willfully.

The proof need not show the precise amount of the additional tax due as alleged in the Superseding Indictment, but it must be established beyond a reasonable doubt that the Defendant knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.

The word "attempt" contemplates that the Defendant had knowledge and an understanding that, during the particular tax year involved, she had income which was taxable, and which the Defendant was required by law to report; but that she nevertheless attempted to evade or defeat the tax, or a substantial portion of the tax on that income, by willfully failing to report all of the income which she knew she had during that year.

Federal income taxes are levied upon income derived from compensation for personal services of every kind and in whatever form paid, whether as wages, commissions, or money earned for performing services. The tax is also levied upon profits earned from any business, regardless of its nature, and from interest, dividends, rents and the like. The income tax also applies to any gain derived from the sale of a capital asset. In short, the term "gross income" means all income from whatever source unless it is specifically excluded by law.

On the other hand, the law does provide that funds acquired from certain sources are not subject to the income tax. The most common non-taxable sources are loans, gifts, inheritances, the

proceeds of insurance policies, and funds derived from the sale of an asset to the extent those funds equal the cost of the asset.

This proposed jury instruction follows the 2003 edition of the Eleventh Circuit Pattern Jury Instructions, but modifies the elements to fit the charged Spies tax evasion. Otherwise, the instruction follows the 2003 pattern.

ANNOTATIONS AND COMMENTS

Regarding the first element. *See Sansone v. United States*, 380 U.S. 343, 351 (1965); *Spies v. United States*, 317 U.S. 492, 497-99 (1943).

Regarding the second element. *See Boulware v. United States*, 552 U.S. 421, 424 (2008); *Sansone*, 380 U.S. at 351; *Lawn v. United States*, 355 U.S. 339, 361 (1958).

Regarding the third element. *See Cheek v. United States*, 498 U.S. 192, 193 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 358-59 (1973); *Sansone*, 380 U.S. at 351; *Holland v. United States*, 348 U.S. 121, 124, 139 (1954).

94
Failure To File Tax Return
26 USC § 7203

Counts Six through Ten of the Superseding Indictment charge the Defendant with Failure to File a Tax Return. Title 26, United States Code, Section 7203, makes it a Federal crime or offense for anyone to willfully fail to file a federal income tax return when required to do so by the Internal Revenue laws or regulations.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant was required by law or regulation to make a return of her income for the taxable year charged;

Second: That the Defendant failed to file a return at the time required by law; and

Third: That the Defendant's failure to file the return was willful.

A person is required to make a federal income tax return for any tax year in which she has gross income in excess of the following thresholds:

CalendarYear	Statutory Due Date	Gross Income Threshold
2008	April 15, 2009	$8,950
2009	April 15, 2010	$9,350
2010	April 18, 2011	$9,350
2011	April 17, 2012	$9,500
2012	April 15, 2013	$9,750

"Gross income" includes the following: (1) Compensation for services, including fees, commissions and similar items; (2) Gross income derived from business; (3) Gains derived from dealing in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.

The Defendant is a person required to file a return if the Defendant's gross income for any calendar year exceeds amounts indicated in the table above even though the Defendant may be

entitled to deductions from that income in a sufficient amount so that no tax is due. So, the Government is not required to prove that a tax was due and owing, or that the Defendant intended to evade or defeat payment of taxes, only that the Defendant willfully failed to file the return.

United States' Requested Special Jury Instruction No. 1

The Tax Code

The Internal Revenue Service is an agency of the United States Department of the Treasury and is responsible for the assessment, ascertainment, computation and collection of federal income taxes, including individual income taxes. The Internal Revenue Code, also known as the tax code, imposes an income tax on all citizens and residents of the United States, as well as non-resident aliens who earn income within the United States. According to the tax code, a person is a "non-resident alien" only if he is neither a citizen of the United States, nor a resident of the United States. A person is a citizen if he was born in the United States, or if born outside the United States, applied for and was granted citizenship.

The tax laws are valid, constitutional and allow for the taxation of income from whatever source derived, including gross income from business, rents, compensation, interest, salaries and wages. The Sixteenth Amendment to the United States Constitution grants Congress the power to tax "incomes, from whatever source derived." Pursuant to this lawful authority, Congress has imposed a tax on the

taxable income of every individual under Title 26, United States Code, Section 1. The imposition of an income tax on individuals is lawful.

By law, the payment of income tax is not voluntary in the sense of it being optional. Voluntary in this context only means that individual taxpayers are responsible for preparing their own tax returns, instead of the government auditing and assessing each person's taxes. A person is required to file a federal income tax return for any calendar year in which he or she has gross income in excess of the minimum filing requirement.

ANNOTATIONS AND COMMENTS

26 U.S.C. §§ 1, 61, 6012(a), 7701(b); 26 C.F.R. ' 1.1-1; 8 U.S.C. ' 1401(a); *United States v. Richards*, 723 F.2d 646, 648 (8th Cir. 1983); *Cheek v. United States*, 498 U.S. 192, 206 (1991); *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); *Donaldson v. United States*, 400 U.S. 517, 534 (1971) (IRS organized to carry out broad responsibilities of Treasury Secretary for administration and enforcement of internal revenue laws); *Commissioner v. Glenshaw Glass*, 348 U.S. 426, 429-30 (1955) (interpreting statue defining gross income); *Reese v. United States*, 24 F.3d 228, 231 (Fed. Cir. 1994) (absent enumerated exception, gross income means all income from whatever source derived); *United States v. Hilgeford*, 7 F.3d 1340, 1342 (7th Cir. 1993).

9.1 B [2010 Pattern]
On or About; Knowingly; Willfully - Intentional Violation of a Known Legal Duty

You'll see that the Superseding Indictment charges that a crime was committed "on or about" a certain date. The Government doesn't have to prove that the crime occurred on an exact date. The Government only has to prove beyond a reasonable doubt that the crime was committed on a date reasonably close to the date alleged. The word "knowingly" means that an act was done voluntarily and intentionally and not because of a mistake or by accident.

The word "willfully" means that the act was done voluntarily and purposely with the specific intent to violate a known legal duty, that is, with the intent to do something the law forbids. Disagreement with the law or a belief that the law is wrong does not excuse willful conduct.

This proposed jury instruction is from the 2010 Edition of the Eleventh Circuit Pattern Jury Instructions for the reasons in the Annotation below.

ANNOTATIONS AND COMMENTS

For crimes requiring a particularized knowledge of the law being violated, such as tax and currency-structuring cases, use this definition of willfulness.

Note: Please refer to the Annotations and Comments following Instruction 9.1A for a detailed commentary regarding the selection of the applicable "willfully" definition. Additionally, there may be instances where a case presents one substantive offense charging a crime subject to the general willfulness mens rea requirement and a separate offense charging a crime subject to the more rigorous mens rea standard set forth above. In such a situation, the Committee recommends providing the applicable definition within the offense instruction itself.

United States' Requested Special Jury Instruction No. 2

Deliberate Ignorance as Proof of Knowledge

Now speaking further about knowledge, the element of knowledge may be satisfied by inferences drawn from the proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to her. A finding beyond a reasonable doubt of conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact. It is entirely up to you as to whether you find deliberate closing of the eyes and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

ANNOTATIONS AND COMMENTS

See Cheek v. United States, 498 U.S. 192, (1991); *United States v. Dean*, 487 F.3d 840, 850-51 (11th Cir. 2007); *United States v. Pflum*, 2005 U.S. App. LEXIS 21813.

9
Good-Faith Defense to Willfulness
(as under the Internal Revenue Code)

Good-Faith is a complete defense to the charges in the Superseding Indictment since good-faith on the part of the Defendant is inconsistent with willfulness, and willfulness is an essential part of the charges. If the Defendant acted in good faith, sincerely believing herself to be exempt by the law from the filing of income tax returns, then the Defendant did not intentionally violate a known legal duty – that is, the Defendant did not act "willfully." The burden of proof is not on the Defendant to prove good-faith intent because the Defendant does not need to prove anything. The Government must establish beyond a reasonable doubt that the Defendant acted willfully as charged.

Intent and motive must not be confused. "Motive" is what prompts a person to act. It is why the person acts.

"Intent" refers to the state of mind with which the act is done.

If you find beyond a reasonable doubt that the Defendant specifically intended to do something that is against the law and voluntarily committed the acts that make up the crime, then the

element of "willfulness" is satisfied, even if the Defendant believed that violating the law was religiously, politically or morally required or that ultimate good would result.

This proposed jury instruction is from the 2010 Edition of the Eleventh Circuit Pattern Jury Instructions, because no such instruction is in the 2003 edition.

ANNOTATIONS AND COMMENTS

This instruction has been updated and now more closely resembles the language of other good faith defenses. *See United States v. Anderson*, 872 F.2d1508, 1517 -18 (11th Cir. 1989), cert. denied, 493 U.S. 1004 (1989). However, in *United States v. Paradies*, 98 F.3d 1266 (11th Cir. 1996), *cert. denied*, 521 U.S. 1106 and 522 U.S. 1014 (1997), the Eleventh Circuit noted that although the jury instructions given in the case were legally sufficient as a whole, a portion of the former Special Instruction 9 "might potentially be deemed confusing." *Id*. at 1285. The updated instruction eliminates the confusion. It may be given when appropriate as a supplement to Basic Instruction 9.1B.

10.2
Caution - - Punishment
(Single Defendant - - Multiple Counts)

A separate crime or offense is charged in each count of the Superseding Indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the Defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any other offense charged.

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether the Defendant is guilty or not guilty. The Defendant is on trial only for those specific offenses alleged in the Superseding Indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the Defendant is convicted the matter of punishment is for the Judge alone to determine later.

Middle District of Florida
Basic
Conjunctive Charge

In these charges, the Court has reviewed the pertinent parts of federal and state statutes (or laws) which are alleged to have been violated. Where a statute specifies several alternative ways in which an offense may be committed, the Superseding Indictment may allege the several ways in the conjunctive, that is, by using the word "and;" therefore, if only one of the alternatives is proved beyond a reasonable doubt, that is sufficient for conviction, so long as the jury agrees unanimously as to at least one of the alternatives.

ANNOTATIONS AND COMMENTS

United States v. Griffin, 705 F.2d 434, 436 (11th Cir. 1983); *United States v. Haymes*, 610 F.2d 309, 310-11 (5th Cir. 1980); *United States v. Gunter*, 546 F.2d 861, 868-69 (10th Cir. 1976), *cert. denied,* 430 U.S. 947 (1977).

Middle District of Florida
Basic
Witnesses

The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matter in issue at this trial. Nor does the law require the prosecution to produce as exhibits all papers and things mentioned in the evidence.

ANNOTATIONS AND COMMENTS

Authority: §17.18, All Available Evidence Need Not Be Produced, Federal Jury Practice and Instructions, Devitt and Blackmar, Vol. I (1977).

11
Duty To Deliberate

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges - - judges of the facts. Your only interest is to seek the truth from the evidence in the case.

12
Verdict

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

[Explain verdict]

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:13-CR-178-T-27AEP

NOVA A. MONTGOMERY

GOVERNMENT'S REQUESTED VOIR DIRE

The United States of America, by A. Lee Bentley, III, United States Attorney for the Middle District of Florida, requests the Court to ask the following questions of the jury panel during jury selection.

Respectfully submitted,

A. LEE BENTLEY, III
United States Attorney

By: *s/ Mark E. Bini*
MARK E. BINI
Assistant United States Attorney
AUSA No. 130
400 N. Tampa Street, Suite 3200
Tampa, Florida 33602-4798
Telephone: (813) 274-6000
Facsimile: (813) 274-6358
E-mail: Mark.Bini@usdoj.gov

U.S. v. Nova A. Montgomery Case No. 8:13-CR-178-T-27AEP

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Lowell H. Becraft, Jr., Esq.
Lisset Gonzalez Hanewicz, Esq.

s/ Mark E. Bini
MARK E. BINI
Assistant United States Attorney
400 N. Tampa Street, Suite 3200
Tampa, Florida 33602-4798
Telephone: (813) 274-6000
Facsimile: (813) 274-6358
E-mail: Mark.Bini@usdoj.gov

GOVERNMENT'S REQUESTED VOIR DIRE NO. 1

Please state your full name.

What is your occupation? If you are retired or not currently working, please state what your last employment was.

Are you married?

Is your spouse employed? If so, what type of work does he or she do?

Do you have any children of working age?

If so, how many and what type of work do they do?

GOVERNMENT'S REQUESTED VOIR DIRE NO. 2

Have you ever served on a jury before, either in state court or in federal court?

If so, when did you serve? Where?

What type of case did you sit as a juror in?

Did the jury on which you served reach a verdict?

Was there anything about that experience you had as a juror which could, in any way, affect your ability to sit as a fair and impartial juror in this type of case and concerning these types of charges?

If you previously sat as a juror in a case, the law which you may have been told in that case may be different from the law that would relate to these criminal charges. Can you assure the Court and both counsel that you will obey and follow the law as I instruct you, even if it is contrary to what you might have been told in the case(s) on which you previously sat as a juror?

GOVERNMENT'S REQUESTED VOIR DIRE NO. 3

Do you have any member of your family, close friend, or acquaintance who is involved in law enforcement, including state or federal police officers, sheriff's deputies, law enforcement agents, FBI, DEA, IRS, or any state or other federal law enforcement agency?

If so, who do you know? What does that person do? What is the nature of your relationship to that person?

Could the fact that you have such a friend or relative in any way affect your ability to be a fair and impartial juror sitting in a criminal case and evaluating the testimony of law enforcement officers?

Does any member of the jury panel have any matter pending before the United States Attorney's Office in this district or any other district in which you are involved as a party, witness, or subject of some legal action?

If so, please explain what type of matter it is and what your involvement in it is.

GOVERNMENT'S REQUESTED VOIR DIRE NO. 4

Have you, any member of your family, or close friend, ever been the victim of a crime?

If so, what happened?

When did this happen?

Was anyone charged or prosecuted as a result of that, to your knowledge?

If so, did you have to speak to police, appear in court, or give testimony in that regard?

Is there anything in that experience which could in any way possibly affect your ability to render a verdict in a criminal case which would be fair and impartial both to the defendant and to the United States?

GOVERNMENT'S REQUESTED VOIR DIRE NO. 5

Has any member of the jury panel ever served as a grand juror, either in state or federal court?

If so, when and where?

Is there anything in that experience which could in any way possibly affect your ability to render a verdict in this type of criminal case which would be fair and impartial both to the defendant and to the United States?

The law with respect to the burden of proof in grand jury proceedings is different from the law that would relate to these charges. Can you assure the Court and both counsel that you will obey and follow the law as I instruct you, even if it is contrary to what you might have been told in the case(s) on which you previously sat as a grand juror?

GOVERNMENT'S REQUESTED VOIR DIRE NO. 6

Has any member of the jury panel, or any family member, relative, or close personal friend or acquaintance of yours, ever been investigated by any federal, state, or local law enforcement agency?

If so, what was the subject of the investigation? What was the outcome of the matter?

Have you or any family member, relative, or close friend ever been arrested, charged, or convicted of any crime?

If so, what was the crime? What was the outcome of the case?

Would this experience in any way cause you to be unable to evaluate fairly and impartially the evidence and testimony of the witnesses who will testify on behalf of the United States?

GOVERNMENT'S REQUESTED VOIR DIRE NO. 7

Have you, any member of your family, or close friend, ever been the subject of an IRS audit?

Is there anything about that experience which could in any way affect your ability to render a verdict in a criminal case which would be fair and impartial both to the defendant and to the United States?

GOVERNMENT'S REQUESTED VOIR DIRE NO. 8

Has anyone ever been a witness in any type of court or judicial proceeding?

If so, what type of proceeding did you give testimony in? Were you subject to cross-examination by attorneys for either side in that case or proceeding?

If your answer to any of these questions was yes, do you feel that your experience as a witness could in any way affect your ability to fairly and impartially evaluate the testimony of the witnesses who will testify in this case?

GOVERNMENT'S REQUESTED VOIR DIRE NO. 9

The attorneys for the United States have advised me that in this case, the government allegedly lost money as a result of the actions of the defendant alleged in the indictment.

Does any member of the jury panel feel that you might in any way treat the allegations of criminal conduct in a case such as this as less serious or less important because of the fact that it was the government and not an individual that may have suffered a loss as a result of that criminal conduct?

GOVERNMENT'S REQUESTED VOIR DIRE NO. 10

Does any member of the jury panel have any strong feelings or opinions concerning the United States government or, more specifically, the United States Internal Revenue Service, which might in any way affect your ability to be a fair and impartial juror in a case such as this?

Does any member of the jury panel believe they have any special experience with or knowledge of the federal income tax laws? If so, what type of experience or knowledge do you have?

GOVERNMENT'S REQUESTED VOIR DIRE NO. 11

The defendant is on trial for his actions as alleged in the indictment. No other person is on trial in this case.

Can you decide this case based upon the evidence offered and not allow your verdict to be affected by any evidence about any other person mentioned during the course of the trial or by your opinions about any of those other persons' actions?

To put it another way, can you promise the Court and counsel that you will not permit opinions you might have from the testimony and evidence you will hear as to what other persons did or did not do to alter or affect your verdict as to the actions and conduct of the defendant himself?

GOVERNMENT'S REQUESTED VOIR DIRE NO. 12

Do any among you have any conscientious objection, religious belief, or other mental reservation such that you could not, in good faith and in good conscience, sit as a juror in this criminal case and return a verdict of guilty if you believed from all the evidence that the United States has proved its case beyond a reasonable doubt?

To put it another way, is there anyone here who feels that for any moral or religious reasons that he or she cannot sit in judgment of another human being?

Do any among you feel that you would be unable to follow the Court's instruction that in reaching your verdict in this case, you must not be influenced in any way by either sympathy or prejudice for or against either the defendant or the United States?

GOVERNMENT'S REQUESTED VOIR DIRE NO. 13

Do any among you belong to any organization that holds among its beliefs that citizens of this country should not be required to pay income taxes, or that the IRS should be abolished?

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **CASE NO. 8:13-cr-178-T-27AEP**

NOVA A. MONTGOMERY
_____/

VERDICT

1. **Count One of the Superseding Indictment**

As to the offense of willfully attempting to evade and defeat the income tax due and owing to the United States of America for calendar year 2002, in violation of 26 U.S.C. § 7201,

We, the Jury, find the defendant, Nova A. Montgomery:

Guilty ___X___ Not Guilty _____

2. **Count Two of the Superseding Indictment**

As to the offense of willfully attempting to evade and defeat the income tax due and owing to the United States of America for calendar year 2003, in violation of 26 U.S.C. § 7201,

We, the Jury, find the defendant, Nova A. Montgomery:

Guilty ___X___ Not Guilty _____

3. **Count Three of the Superseding Indictment**

As to the offense of willfully attempting to evade and defeat the income tax due and owing to the United States of America for calendar year 2004, in violation of 26 U.S.C. § 7201,

We, the Jury, find the defendant, Nova A. Montgomery:

Guilty X Not Guilty _____

4. **Count Four of the Superseding Indictment**

As to the offense of willfully attempting to evade and defeat the income tax due and owing to the United States of America for calendar year 2005, in violation of 26 U.S.C. § 7201,

We, the Jury, find the defendant, Nova A. Montgomery:

Guilty X Not Guilty _____

5. **Count Five of the Superseding Indictment**

As to the offense of willfully attempting to evade and defeat the income tax due and owing to the United States of America for calendar year 2006, in violation of 26 U.S.C. § 7201,

We, the Jury, find the defendant, Nova A. Montgomery:

Guilty X Not Guilty _____

6. **Count Six of the Superseding Indictment**

As to the offense of willfully failing to file an income tax return for calendar year 2008, in violation of 26 U.S.C. § 7203,

We, the Jury, find the defendant, Nova A. Montgomery:

Guilty X Not Guilty _____

7. **Count Seven of the Superseding Indictment**

As to the offense of willfully failing to file an income tax return for calendar year 2009, in violation of 26 U.S.C. § 7203,

We, the Jury, find the defendant, Nova A. Montgomery:

Guilty X Not Guilty _____

8. **Count Eight of the Superseding Indictment**

As to the offense of willfully failing to file an income tax return for calendar year 2010, in violation of 26 U.S.C. § 7203,

We, the Jury, find the defendant, Nova A. Montgomery:

Guilty X Not Guilty _____

9. **Count Nine of the Superseding Indictment**

As to the offense of willfully failing to file an income tax return for calendar year 2011, in violation of 26 U.S.C. § 7203,

We, the Jury, find the defendant, Nova A. Montgomery:

Guilty X Not Guilty _____

10. Count Ten of the Superseding Indictment

As to the offense of willfully failing to file an income tax return for calendar year 2012, in violation of 26 U.S.C. § 7203,

We, the Jury, find the defendant, Nova A. Montgomery:

Guilty X Not Guilty _____

SO SAY WE ALL, this 10 day of October, 2014.

FOREPERSON

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **CASE NO. 8:13-CR-178-T-27AEP**

NOVA A. MONTGOMERY
_____/

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions – what we call your deliberations.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find the Defendant guilty of the crimes charged in the Superseding Indictment.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or to produce any evidence at all. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find the Defendant not guilty.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that a Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case. It may arise from the evidence, lack of evidence, or conflicts in the evidence.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As I said earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact; or, whether there was evidence that at some other time a witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe the Defendant's testimony.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters.

Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

The Superseding Indictment charges ten separate crimes, called "counts," against the Defendant. Each count has a number. You will be given a copy of the Superseding Indictment to refer to during your deliberations. Counts One through Five charge the Defendant with Tax Evasion. Counts Six through Ten charge the Defendant with Failure to File Tax Returns. I will explain the law governing those substantive offenses in a moment.

Counts One through Five of the Superseding Indictment charge the Defendant with tax evasion in violation of Title 26, United States Code, Section 7201. Section 7201 makes it a Federal crime or offense for anyone to willfully attempt to evade or defeat the payment of federal income taxes.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant committed an affirmative act constituting an attempt to evade or defeat a tax or the payment thereof;

Second: That an additional tax is due and owing; and

Third: The Defendant acted willfully.

The proof need not show the precise amount of the additional tax due as alleged in the Superseding Indictment, but it must be established beyond a reasonable doubt that the Defendant knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.

The word "attempt" contemplates that the Defendant had knowledge and an understanding that, during the particular tax year involved, she had income which was taxable, and which the Defendant was required by law to report; but that she nevertheless attempted to evade or defeat the tax, or a substantial portion of the tax on that income, by willfully failing to report all of the income which she knew she had during that year. Failure to file a tax return or failure to pay taxes, without any additional act, does not constitute an affirmative act constituting an attempt to evade or defeat a tax or the payment thereof.

Federal income taxes are levied upon income derived from compensation for personal services of every kind and in whatever form paid, whether as wages, commissions, or money earned for performing services. The tax is also levied upon profits earned from any business, regardless of

its nature, and from interest, dividends, rents and the like. The income tax also applies to any gain derived from the sale of a capital asset. In short, the term "gross income" means all income from whatever source unless it is specifically excluded by law.

On the other hand, the law does provide that funds acquired from certain sources are not subject to the income tax. The most common non-taxable sources are loans, gifts, inheritances, the proceeds of insurance policies, and funds derived from the sale of an asset to the extent those funds equal the cost of the asset.

In these charges, the Court has reviewed the pertinent parts of federal statutes which are alleged to have been violated. Where a statute specifies several alternative ways in which an offense may be committed, the Superseding Indictment may allege the several ways in the conjunctive, that is, by using the word "and;" therefore, if only one of the alternatives is proved beyond a reasonable doubt, that is sufficient for conviction, so long as the jury agrees unanimously as to at least one of the alternatives.

Counts Six through Ten of the Superseding Indictment charge the Defendant with Failure to File a Tax Return. Title 26, United States Code, Section 7203, makes it a Federal crime or offense for anyone to willfully fail to file a federal income tax return when required to do so by the Internal Revenue laws or regulations.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant was required by law or regulation to make a return of her income for the taxable year charged;

Second: That the Defendant failed to file a return at the time required by law; and

Third: That the Defendant's failure to file the return was willful.

A person is required to make a federal income tax return for any tax year in which she has gross income in excess of the following thresholds:

CalendarYear	Statutory Due Date	Gross Income Threshold
2008	April 15, 2009	$8,950
2009	April 15, 2010	$9,350
2010	April 18, 2011	$9,350
2011	April 17, 2012	$9,500
2012	April 15, 2013	$9,750

"Gross income" includes the following: (1) Compensation for services, including fees, commissions and similar items; (2) Gross income derived from business; (3) Gains derived from dealing in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.

The Defendant is a person required to file a return if the Defendant's gross income for any calendar year exceeds amounts indicated in the table above even though the Defendant may be entitled to deductions from that income in a sufficient amount so that no tax is due. So, the Government is not required to prove that a tax was due and owing, or that the Defendant intended to evade or defeat payment of taxes, only that the Defendant willfully failed to file the return.

The Internal Revenue Service is an agency of the United States Department of the Treasury and is responsible for the assessment, ascertainment, computation and collection of federal income taxes, including individual income taxes. The Internal Revenue Code, also known as the tax code, imposes an income tax on all citizens and residents of the United States, as well as non-resident aliens who earn income within the United States. According to the tax code, a person is a "non-resident alien" only if he or she is neither a citizen of the United States, nor a resident of the United States. A person is a citizen if he or she was born in the United States, or if born outside the United States, applied for and was granted citizenship.

The tax laws are valid, constitutional and allow for the taxation of income from whatever source derived, including gross income from business, rents, compensation, interest, salaries and wages. The Sixteenth Amendment to the United States Constitution grants Congress the power to tax "incomes, from whatever source derived." Pursuant to this lawful authority, Congress has imposed a tax on the taxable income of every individual under Title 26, United States Code, Section 1. The imposition of an income tax on individuals is lawful.

By law, the payment of income tax is not voluntary in the sense of it being optional. Voluntary in this context only means that individual taxpayers are responsible for preparing their own tax returns, instead of the government auditing and assessing each person's taxes. A person is required to file a federal income tax return for any calendar year in which he or she has gross income in excess of the minimum filing requirement.

The Superseding Indictment charges that a crime was committed "on or about" a certain date. The Government does not have to prove that the crime occurred on an exact date. The Government only has to prove beyond a reasonable doubt that the crime was committed on a date reasonably close to the date alleged.

The word "knowingly" means that an act was done voluntarily and intentionally and not because of a mistake or by accident.

The word "willfully" means that the act was done voluntarily and purposely with the specific intent to violate a known legal duty, that is, with the intent to do something the law forbids. Disagreement with the law or a belief that the law is wrong does not excuse willful conduct.

The element of knowledge may be satisfied by inferences drawn from the evidence that a defendant deliberately closed her eyes to what would otherwise have been obvious to her. A finding beyond a reasonable doubt of conscious purpose to avoid enlightenment or understanding would permit an inference of knowledge on the part of a defendant. Stated another way, a defendant's knowledge of a fact may be inferred from deliberate ignorance to the existence of the fact. It is entirely up to you as to whether you find deliberate closing of the eyes and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

Intentional flight by a person after a crime has been committed is not, of course, sufficient in itself to establish the guilt of that person, but intentional flight under those circumstances is a fact which, if proved, may be considered by the jury in light of all the other evidence in the case in determining the guilt or innocence of that person.

Whether or not the defendant's conduct constituted flight is exclusively for you, as the jury, to determine. And if you do so determine that flight showed a consciousness of guilt on the defendant's part, the significance to be attached to that evidence is also a matter exclusively for you as a jury to determine.

I do remind you that in your consideration of any evidence of flight, if you should find that there was flight, you should consider that there may be reasons for this which are fully consistent with innocence. And, may I suggest to you that a feeling of guilt does not necessarily reflect actual guilt of a crime which you may be considering.

Good-Faith is a complete defense to the charges in the Superseding Indictment since good-faith on the part of the Defendant is inconsistent with willfulness, and willfulness is an essential part of the charges. If the Defendant acted in good faith, sincerely believing herself to be exempt by the law from the filing of income tax returns, then the Defendant did not intentionally violate a known legal duty – that is, the Defendant did not act "willfully." The burden of proof is not on the Defendant to prove good-faith intent because the Defendant does not need to prove anything. The Government must establish beyond a reasonable doubt that the Defendant acted willfully as charged.

Intent and motive must not be confused. "Motive" is what prompts a person to act. It is why the person acts.

"Intent" refers to the state of mind with which the act is done.

If you find beyond a reasonable doubt that the Defendant specifically intended to do something that is against the law and voluntarily committed the acts that make up the crime, then the element of "willfulness" is satisfied, even if the Defendant believed that violating the law was religiously, politically or morally required or that ultimate good would result. The Defendant's claimed good-faith belief need not be objectively reasonable; however, the reasonableness of a belief is a factor for the jury to consider in determining whether the Defendant actually held a belief and acted upon it. A Defendant who knows what the law is and who disagrees with it does not have a bona fide misunderstanding defense. A persistent refusal to acknowledge the law does not constitute a good-faith misunderstanding of the law.

The Defendant is not on trial for any conduct not charged in the Superseding Indictment. In other words, she cannot be convicted merely because she associated with others who the evidence may show acted in violation of the law. Such evidence may be considered however, as to whether the Defendant acted knowingly and willfully. The Government must prove each element of the charged offenses beyond a reasonable doubt on the basis of the Defendant's own conduct and state of mind.

A separate crime or offense is charged in each count of the Superseding Indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the Defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any other offense charged.

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether the Defendant is guilty or not guilty. The Defendant is on trial only for those specific offenses alleged in the Superseding Indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the Defendant is convicted the matter of punishment is for the Judge alone to determine later.

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges - - judges of the facts. Your only interest is to seek the truth from the evidence in the case.

In this case you have been permitted to take notes during the course of the trial, and most of you - - perhaps all of you - - have taken advantage of that opportunity and have made notes from time to time.

You will have your notes available to you during your deliberations, but you should make use of them only as an aid to your memory. In other words, you should not give your notes any precedence over your independent recollection of the evidence or the lack of evidence; and neither should you be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court. A form of verdict has been prepared for your convenience.

[Explain verdict]

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

380 U.S. 343
Supreme Court of the United States

Michael C. SANSONE, Petitioner,
v.
UNITED STATES.

No. 365. | Argued March 10, 1965. | Decided March 29, 1965.

Prosecution for willfully and knowingly attempting to evade and defeat federal income tax by omitting to report a long term capital gain. The United States District Court for the Eastern District of Missouri entered a judgment of conviction, and the taxpayer appealed. The United States Court of Appeals for the Eighth Circuit, 334 F.2d 287, affirmed and certiorari was granted. The Supreme Court, Mr. Justice Goldberg, held that because there were no disputed issues of fact which would justify an instruction that taxpayer had committed all elements necessary for conviction under statutes which make it a misdemeanor to willfully fail to pay taxes when due and to willfully file false document without having violated statute making it a felony to willfully attempt to evade or defeat tax, taxpayer was not entitled to a lesser-included offense charge.

Affirmed.

Mr. Justice Black and Mr. Justice Douglas dissented.

Attorneys and Law Firms

****1006 *343** Merle L. Silverstein, Clayton, Mo., for petitioner.

Paul Bender, Philadelphia, Pa., for respondent, pro hac vice, by special leave of Court.

Opinion

***344** Mr. Justice GOLDBERG delivered the opinion of the Court.

Petitioner Sansone was indicted for willfully attempting to evade federal income taxes for the year 1957 in violation of s 7201 of the Internal Revenue Code of 1954. Section 7201 provides:

> 'Any person who willfully attempts in any maner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.'

The following facts were established at trial. In March 1956 petitioner and his wife purchased a tract of land for $22,500 and simultaneously sold a portion of the tract for $20,000. In August 1957 petitioner sold another portion of the tract for $27,000. He did not report the gain on either the 1956 or 1957 sale in his income tax returns for those years.[1] Petitioner conceded that the 1957 transaction was reportable and that, in not reporting it, he understated his tax liability for that year by $2,456.48. He contended, however, that this understatement was not willful since he believed at the time that extensive repairs on a creek adjoining a portion of the tract he retained might be necessary and that the cost of these repairs might wipe out his profit on the 1957 sale.

[1] Petitioner was charged with a violation of s 7201 for 1956 in addition to the charge for 1957. The jury acquitted him with respect to the 1956 charge, which is consequently not involved in this case.

To counter this defense, the Government introduced the following signed statement made by petitioner during the Treasury investigation of his tax return:

> 'I did not report the 1957 sale in our joint income tax return for 1957 because I was burdened with a ***345** number of financial obligations and did not feel I could raise the money to pay any tax due. It was my intention to report all sales in a future year and pay the tax due. I knew that I should have reported the 1957 sale, but my wife did not ****1007** know that it should have been reported. It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so.'

At the conclusion of the trial, petitioner requested that the jury be instructed that it could acquit him of the charged offense of willfully attempting to evade or defeat taxes in violation of s 7201, but still convict him of either or both of the asserted lesser-included offenses of willfully filing a fraudulent or false return, in violation of s 7207,[2] or willfully failing to pay his taxes at the time required by

law, in violation of s 7203.[3] Section 7201 is a felony providing for a maximum fine of $10,000 and imprisonment for five years. Both ss 7203 and 7207 are misdemeanors with maximum prison sentences of one year under each ***346** section, and maximum fines of $10,000 under s 7203 and $1,000 under s 7207.

[2] Section 7207 of the Internal Revenue Code of 1954 provides:
'Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.'

[3] Section 7203 of the Internal Revenue Code of 1954 provides:
'Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.'

[1] The requested instructions were denied.[4] Petitioner was found guilty by the jury of violating s 7201, and was ****1008 *347** sentenced by the court to pay a fine of $2,000 and to serve 15 months' imprisonment. The conviction was upheld by the Court of Appeals. 334 F.2d 287. We granted certiorari to consider the applicability of the lesser-included offense doctrine to these federal tax statutes. 379 U.S. 886, 85 S.Ct. 159, 13 L.Ed.2d 92.

[4] The full instructions requested by petitioner were as follows:
No. 1. 'Under the law you may find a defendant guilty of a lesser crime than the crimes charged in the indictment.
'A statute upon which a lesser crime is based (Section 7203 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case, reads as follows:
"Any person required under this title to pay any * * * tax, * * * who willfully fails to pay such tax, * * * at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor.'
'and then the statute provides for the penalty.
'Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully failed to pay the correct tax to the United States at the time of the filing of his return, but you further find that the defendant did not willfully attempt to defeat and evade his income taxes by the filing of a false and fraudulent return, you will in your verdict say 'Guilty of violating a lesser-included offense.'
'If you have a reasonable doubt as to whether defendant willfully failed to pay the correct tax when filing his income tax return or returns under any count or counts of this indictment, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts.'
No. 2. 'As I have said previously, the law permits the jury to find a defendant guilty of any lesser offense which is necessarily included in the crime charged. The offense charged in the indictment here necessarily includes a lesser offense based upon the following statute (Section 7207 of the Internal Revenue Code of 1954), omitting that part of the Act which does not apply in this case; it reads as follows:
"Any person who willfully delivers or discloses to the Secretary (of the Treasury) or his delegate any * * * return, * * * or other document known by him to be fraudulent or to be false as to any material matter,' 'and then the statute provides for the penalty.
'Therefore, if you find beyond a reasonable doubt that (with respect to either or both of the counts in this indictment) the defendant willfully delivered to the District Director of Internal Revenue at St. Louis, Missouri his and his wife's federal joint income tax return or returns for the years 1956 and 1957 which were known by him to be fraudulent or false as to any material matter, but you further find that the defendant did not willfully attempt to defeat and evade his income tax by the filing of a false and fraudulent return, you will in your verdict say 'Guilty of violating a lesser-included offense.'
'If you have a reasonable doubt as to whether defendant willfully so delivered under any count or counts of this indictment his and his wife's federal joint income tax return or returns which were known by him to be fraudulent or false as to a material matter, you will resolve the doubt in favor of the defendant and acquit him of the lesser-included offense as to such count or counts.'

I.

We are faced with the threshold question as to whether or not s 7207, which proscribes the willful filing with a Treasury official of any known false or fraudulent 'return,' applies to the filing of an income tax return.[5] If s 7207 does not apply to income tax returns, it is obvious that the defendant was not here entitled to a lesser-included offense charge based on that section.

[5] This issue divided the Court of Appeals, with two judges holding that s 7207 does not apply to false income tax returns and one judge, concurring in result,

dissenting on this point.

This Court held in Achilli v. United States, 353 U.S. 373, 77 S.Ct. 995, 1 L.Ed.2d 918 that s 7207's statutory predecessor, s 3616(a) of the Internal Revenue Code of 1939, which made it a misdemeanor for any person to deliver to the Collector of Revenue 'any false or fraudulent list, return, account, or statement, with intent to defeat or evade the ***348** valuation, enumeration, or assessment intended to be made * * *' (emphasis added), despite its broad language, was not intended by Congress to apply to income tax returns.

There were two major bases of this Court's conclusion in Achilli that s 3616(a) did not apply to such returns. First, unlike other criminal provisions clearly applicable to income taxes which appeared in the income tax chapter of the 1939 Code and were specifically designed to punish evasion of that tax, s 3616(a) was placed among the Code's 'General Administrative Provisions' and did not specifically refer to income taxes. Second, s 3616(a) required that the false or fraudulent return be filed 'with intent to defeat or evade the valuation, enumeration, or assessment intended to be made.' This provision, as the Court had already held in Berra v. United States, 351 U.S. 131, 76 S.Ct. 685, 100 L.Ed. 1013, if applied to income tax returns would have made s 3616(a) completely co-extensive with the predecessor of s 7201 where the attempt to evade income taxes was accomplished by filing a fraudulent income tax return. It was clear that the predecessor of s 7201 applied to this method of attempting to evade income taxes and the Court was unwilling to presume that Congress intended to enact both felony and misdemeanor provisions which completely overlap in this important area.

Both of these bases of decision were removed by the 1954 Code. Unlike their predecessors in the 1939 Code, ss 7201, 7203, and 7207, together with other sections clearly applicable to income tax violations, were all placed in the same section (Part I of Chapter 75) of the 1954 Code. Congress specifically stated that it placed all these provisions in the same part of the Code because it wished ****1009** them to apply to taxes generally, including income taxes. See S.Rep.No.1622, 83d Cong., 2d Sess., 147; H.R.Rep.No.1337, ***349** 83d Cong., 2d Sess., 108. In contrast, Part II of Chapter 75 contains provisions applicable only to specified taxes, none of which include income taxes.

Further, Congress, in enacting s 7207 did not re-enact s 3616(a)'s requirement that the false or fraudulent return be made with 'intent to defeat or evade' the tax due. Thus the second basis for the Court's conclusion in Achilli that s 3616(a) did not apply to income taxes was removed. See Berra v. United States, supra, 351 U.S. at 134, n. 5, 76 S.Ct. at 688. Finally, in providing that the false or fraudulent return be made 'willfully,' s 7207 was conformed to the language contained in the other misdemeanor provisions clearly applicable to income taxes. See, e.g., s 7203.

[2] [3] We conclude, therefore, that s 7207 applies to income tax violations. Since there is no doubt that ss 7201 and 7203 also apply to income tax violations, with obvious overlapping among them, there can be no doubt that the lesser-included offense doctrine applies to these statutes in an appropriate case. See Spies v. United States, 317 U.S. 492, 495, 63 S.Ct. 364, 366, 87 L.Ed. 418; Berra v. United States, supra.

II.

[4] [5] [6] [7] The basic principles controlling whether or not a lesser-included offense charge should be given in a particular case have been settled by this Court. Rule 31(c) of the Federal Rules of Criminal Procedure provides in relevant part, that the 'defendant may be found guilty of an offense necessarily included in the offense charged.' Thus, '(i)n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie(s) it * * * (is) entitled to an instruction which would permit a finding of guilt of the lesser offense.' Berra v. United States, supra, at 134, 76 S.Ct. at 688. See Stevenson v. United States, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980. But a lesser-offense charge is not proper where, on the ***350** evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. Berra v. United States, supra; Sparf v. United States, 156 U.S. 51, 63—64, 15 S.Ct. 273, 277—278, 39 L.Ed. 343. In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. Berra v. United States, supra; Sparf v. United States, supra, 156 U.S. at 63—64, 15 S.Ct. at 277—278.[6] We now apply the principles declared in these cases to the instant case.

[6] This Court has long recognized that to hold otherwise would only invite the jury to pick between the felony and the misdemeanor so as to determine the punishment to be imposed, a duty Congress has traditionally left to the judge. See Sparf v. United States, supra, at 63—64, 15 S.Ct. at 277—278; Berra v. United States, supra, 351 U.S. at 135, 76 S.Ct. at 688. This general principle is particularly applicable in this area. In commenting on s 7201, the House Ways and Means Committee expressly stated that minimum penalties were omitted from s 7201 in order to make it 'possible for the judges to better fix the penalties to fit the circumstances.' H.R.Rep. No. 1337, 83d Cong., 2d Sess., 108. The lack

> of minimum penalties also, of course, denies to the prosecutor an unbridled discretion as to the penalty to be imposed upon particular defendants by deciding whether, on the same facts, to charge a felony or a misdemeanor.

III.

[8] [9] The offense here charged was a violation of s 7201, which proscribes ****1010** willfully attempting in any manner to evade or defeat any tax imposed by the Internal Revenue Code. As this Court has recognized, this felony provision is 'the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of ***351** delinquency.' Spies v. United States, supra, 317 U.S. at 497, 63 S.Ct. at 367. As such a capstone, s 7201 necessarily includes among its elements actions which, if isolated from the others, constitute lesser offenses in this hierarchical system of sanctions. Therefore, if on the facts of a given case there are disputed issues of fact which would enable the jury rationally to find that, although all the elements of s 7201 have not been proved, all the elements of one or more lesser offenses have been, it is clear that the defendant is entitled to a lesser-included offense charge as to such lesser offenses.

[10] [11] [12] [13] [14] **As has been held by this Court, the elements of s 7201 are will-fulness; the existence of a tax deficiency,** Lawn v. United States, 355 U.S. 339, 361, 78 S.Ct. 311, 323, 2 L.Ed.2d 321; Spies v. United States, supra, 317 U.S. at 496, 63 S.Ct. at 366; and an affirmative act constituting an evasion or attempted evasion of the tax, Spies v. United States, supra. In comparison, s 7203 makes it a misdemeanor willfully to fail to perform a number of specified acts at the time required by law—the one here relevant being the failure to pay a tax when due. This misdemeanor requires only willfulness and the omission of the required act—here the payment of the tax when due. As recognized by this Court in Spies v. United States, supra, 317 U.S. at 499, 63 S.Ct. at 368, the difference between a mere willful failure to pay a tax (or perform other enumerated actions) when due under s 7203 and a willful attempt to evade or defeat taxes under s 7201 is that the latter felony involves 'some willful commission in addition to the willful omissions that make up the list of misdemeanors.' Where there is, in a s 7201 prosecution, a disputed issue of fact as to the existence of the requisite affirmative commission in addition to the s 7203 omission, a defendant would, of course, be entitled to a lesser-included offense charge based on s 7203. Cf. Spies v. United States, supra. In this case, however, it is undisputed that petitioner filed ***352** a tax return and that the petitioner's filing of a false tax return constituted a sufficient affirmative commission to satisfy that requirement of s 7201. The only issue at trial was whether petitioner's act was willful. Given this affirmative commission and the conceded tax deficiency, if petitioner's act was fillful, that is, if the jury believed, as it obviously did, that he knew that the capital gain on the sale of the property was reportable in 1957, he was guilty of violating both ss 7201 and 7203. If his act was not willful, he was not guilty of violating either s 7201 or s 7203. Thus on the facts of this case, ss 7201 and 7203 'covered precisely the same ground.' Berra v. United States, supra, 351 U.S. at 134, 76 S.Ct. at 688. This being so, on the authorities cited, it is clear that petitioner was not entitled to a lesser-included offense charge based on s 7203.

[15] [16] [17] Section 7207 requires the willful filing of a document known to be false or fraudulent in any material manner. The elements here involved are willfulness and the commission of the prohibited act. Section 7207 does not, however, require that the act be done as an attempt to evade or defeat taxes. Conduct could therefore violate s 7207 without violating s 7201 where the false statement, though material, does not constitute an attempt to evade or defeat taxation because it does not have the requisite effect of reducing the stated tax liability. This may be the case, for example, where a taxpayer understates his gross receipts and he offsets this by also understating his deductible expenses. ****1011** In this example, if the Government in a s 7201 case charged tax evasion on the grounds that the defendant had understated his tax by understating his gross receipts, and the defendant contended that this was not so, as the misstatement of gross receipts had been offset by an understatement of deductible expenses, the defendant would be entitled to a lesser- ***353** included offense charge based on s 7207, there being this relevant disputed issue of fact. This would be so, for in such a case, if the jury believed that an understatement of deductible expenses had offset the understatement of gross receipts, while the defendant would have violated s 7207 by willfully making a material false and fraudulent statement on his return, he would not have violated s 7201 as there would not have been the requisite s 7201 element of a tax deficiency. Here, however, there is no dispute that petitioner's material misstatement resulted in a tax deficiency. Thus there is no disputed issue of fact concerning the existence of an element required for conviction of s 7201 but not required for conviction of s 7207. Given petitioner's material misstatement which resulted in a tax deficiency, if, as the jury obviously found, petitioner's act was willful in the sense that he knew that he should have reported more income than he did for the year 1957, he was guilty of violating both ss 7201 and 7207. If his action was not willful, he was guilty of violating neither. As was true with s 7203, on the facts of this case ss 7201 and 7207 'covered precisely the same ground,' Berra v. United States, supra, at 134, 76 S.Ct. at 688, and thus petitioner was not entitled to a lesser-included offense charge based

on s 7207.

[18] Petitioner makes one final contention. He argues that he could have been acquitted of attempting to evade or defeat his 1957 taxes, in violation of s 7201, but still have been convicted for willfully failing to pay his tax when due in violation of s 7203 or willfully filing a fraudulent return in violation of s 7207, if the jury believed his statement contained in the government-introduced affidavit, that, although he knew that profit on the sale in question was reportable for 1957 and that tax was due thereon, he intended to report the sale and pay the 1957 tax at some unspecified future date. The basic premise of this argument ***354** is that, although all three sections require willfulness, on the facts here, the contents of these willfulness requirements differ. The argument is made that while an intent to report and pay the tax in the future does not vitiate the willfulness requirements of ss 7203 and 7207, it does constitute a defense to a willful attempt 'in any manner to evade or defeat any tax imposed by' the Internal Revenue Code, in violation of s 7201. While we agree that the intent to report the income and pay the tax sometime in the future does not vitiate the willfulness required by ss 7203 and 7207, we cannot agree that it vitiates the willfulness requirement of s 7201.

[19] [20] No defense to a s 7201 evasion charge is made out by showing that the defendant willfully and fraudulently understated his tax liability for the year involved but intended to report the income and pay the tax at some later time. As this Court has recognized, s 7201 includes the offense of willfully attempting to evade or defeat the assessment of a tax as well as the offense of willfully attempting to evade or defeat the payment of a tax. Lawn v. United States, supra. The indictment here charged an attempt to evade income taxes by defeating the assessment for 1957. The fact that petitioner stated to a revenue agent that he intended to report his 1957 income in some later year, even if taken at face value, would not detract from the criminality of his willful act defeating the 1957 assessment. **That crime was complete as soon as the false and fraudulent understatement of taxes (assuming, of course, that there was in fact a deficiency) was filed.** See ****1012** United States v. Beacon Brass Co., 344 U.S. 43, 46, 73 S.Ct. 77, 79. See also Spies v. United States, supra, 317 U.S. at 498—499, 63 S.Ct. at 367—368.

In sum, it is clear here that there were no disputed issues of fact which would justify instructing the jury that it could find that petitioner had committed all the elements ***355** of either or both of the ss 7203 and 7207 misdemeanors without having committed a violation of the s 7201 felony. This being the case, the petitioner was not entitled to a lesser-included offense charge and the judgment of the Court of Appeals is

Affirmed.

Mr. Justice BLACK and Mr. Justice DOUGLAS dissent, believing that there was evidence sufficient to require the Court to charge the jury, as petitioner requested, that they could acquit him on this felony charge of having willfully attempted to evade or defeat taxes in violation of s 7201 but still convict him of the lesser misdemeanor offenses included in the felony charge. See Berra v. United States, 351 U.S. 131, 135, 76 S.Ct. 685, 688 (dissenting opinion). Cf. Achilli v. United States, 353 U.S. 373, 379, 77 S.Ct. 995, 998 (dissenting opinion).

Parallel Citations

85 S.Ct. 1004, 13 L.Ed.2d 882, 15 A.F.T.R.2d 611, 65-1 USTC P 9307, 1965-2 C.B. 451

End of Document

893 F.2d 1300
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Gerald KAISER, Defendant–Appellant.

No. 86–5626. | Feb. 9, 1990. | As Amended March 15, 1990.

Defendant was convicted, pursuant to guilty plea for filing false tax return and for tax evasion by filing same false return by the United States District Court for the Southern District of Florida, Nos. 86–0254 CR-SMA, 85–299 CR-SMA, Sidney M. Aronovitz, J., and defendant appealed. The Court of Appeals, 833 F.2d 1019 (unpublished opinion), determined that defendant waived his right to raise double jeopardy claim when he entered guilty plea. The United States Supreme Court, 109 S.Ct. 1105, granted certiorari, vacated decision and remanded. On remand, the Court of Appeals, Anderson, Circuit Judge, held that: (1) defendant did not waive double jeopardy claim to entry of guilty plea, and (2) defendant was improperly convicted and sentenced for both greater offense of tax evasion and lesser-included offense of filing false tax return.

Affirmed and modified.

Attorneys and Law Firms

***1301** Theodore J. Sakowitz, Federal Public Defender, Richard C. Klugh, Jr., Asst. Federal Public Defender, Miami, Fla., Gerald Kaiser, Lauderhill, Fla., for defendant-appellant.

Dexter W. Lehtinen, U.S. Atty., Robert Bondi, Linda Collins Hertz, Sonia Escobio O'Donnell, Asst. U.S. Attys., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before JOHNSON and ANDERSON, Circuit Judges, and ATKINS*, Senior District Judge.

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

ANDERSON, Circuit Judge:

Appellant, Gerald Kaiser, pleaded guilty to a four count tax indictment. Counts one and two of the indictment alleged tax evasion in violation of 26 U.S.C. § 7201 for the calendar years 1979 and 1980. Both counts alleged that Kaiser "did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him ... for the calendar year [1979, count one; 1980, count two], by signing ... a false and fraudulent U.S. Individual Income Tax Return, Form 1040...." Counts three and four of the indictment alleged that Kaiser violated 26 U.S.C. § 7206(1) by filing false tax returns for 1979 and 1980, the same returns that are the subject of counts one and two. Counts three and four allege that Kaiser "did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year [1979, count three; 1980, count four], which was verified by a written declaration that it was made under the penalties of perjury ... which said Individual Income Tax Return ***1302** he did not believe to be true and correct as to every material matter...."

Counts one and three, involving the 1979 tax return, both allege that Kaiser stated on his Form 1040 that his taxable income for 1979 was $46,045.00 and that the tax due and owing was $14,310.00, when he knew and believed that his taxable income was substantially higher. Counts two and four, involving the 1980 tax return, both allege that Kaiser stated that his taxable income for 1980 was $43,680.00 and that the tax due was $14,674.00, when he knew it to be higher.

Kaiser pleaded guilty to all four counts. The district court sentenced Kaiser to two years in prison on each of counts one and two, the periods of confinement to be consecutive, and $10,000 in fines on each count. On counts three and four, the district court placed the defendant on five years probation for each count, concurrent to each other and consecutive to counts one and two. The court further ordered $2,500 fines on each of counts three and four.

Kaiser appealed, arguing *inter alia* that the imposition of consecutive sentences for filing a false tax return and for tax evasion by filing the same false return violates the Double Jeopardy Clause of the Fifth Amendment. This court held that Kaiser waived his right to raise a double jeopardy claim when he entered his guilty pleas, and therefore we did not reach the merits of the double jeopardy issue. *United States v. Kaiser,* 833 F.2d 1019 (11th Cir.1987) (Table). The United States Supreme

Court subsequently vacated that decision and remanded the case for further consideration in light of *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). *Kaiser v. United States*, 489 U.S. 1002, 109 S.Ct. 1105, 103 L.Ed.2d 170 (1989). Upon reconsideration, we conclude (1) that Kaiser's guilty plea did not waive his right to raise the double jeopardy claim and (2) that the convictions and consecutive sentences for tax evasion and for filing a false return constitute, in this case, a violation of the Double Jeopardy Clause.[1]

[1] Kaiser's other claims on appeal have no merit and warrant no discussion.

I. WAIVER OF THE DOUBLE JEOPARDY CLAIM

[1] [2] Once a conviction upon a guilty plea has become final, the general rule is that any challenge to the conviction is limited to whether the underlying plea was counseled and voluntary. *United States v. Broce*, 488 U.S. at ——, 109 S.Ct. at 762. Here, Kaiser's claims that his plea was involuntary and that he received ineffective assistance of counsel are wholly without merit. Ordinarily, then, he would be barred from challenging his conviction. However, the Supreme Court has recognized that there are exceptions to the rule barring collateral attacks on a guilty plea. One such exception, established in *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam), and *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), and explained recently in *Broce*, occurs when a charge against a defendant, judged on the basis of the record that existed at the time the guilty plea was entered, is one the State may not constitutionally prosecute.[2] *See Broce*, 488 U.S. at ——, 109 S.Ct. at 765. Although the Supreme Court held that *Broce* itself did not fit within the *Menna*/*Blackledge* exception, the case presently before us does fit within that exception, and therefore Kaiser's plea did not waive his right to challenge his conviction.

[2] We note that both *Menna* and *Blackledge* involved attempts by the government to bring a second prosecution against a defendant who had already been convicted of the same offense. Thus, the language of those cases referred to a prohibition against a second prosecution. The instant case does not involve the double jeopardy protection against a second prosecution; rather, it involves the third prong of double jeopardy protection, i.e., the protection against multiple punishments for the same offense. See *infra* at 1304. However, the principle involved in *Menna* and *Blackledge* would seem to be equally applicable to this third prong of double jeopardy protection. Indeed *Broce* itself also involved the double jeopardy protection against multiple punishments.

In *Broce*, the defendants pleaded guilty to an indictment that, on its face, described ***1303** separate offenses (two different conspiracies). On appeal, the defendants argued that the separate conspiracies identified in the indictment were actually smaller parts of one overarching conspiracy, and they contended that conviction and punishment for more than one conspiracy violated double jeopardy protections. The Court held, however, that because the indictment on its face alleged two distinct conspiracies, the defendants' guilty pleas admitted guilt for two conspiracies, not one. The defendants could not show that there was one conspiracy—thus establishing that their cumulative convictions and punishments violated double jeopardy—without relying on factual evidence outside the guilty plea record. The defendants were therefore barred from challenging their convictions.

In contrast to *Broce*, the present case does not require this court to rely on evidence outside the guilty plea record to determine that Kaiser's punishment violated the Double Jeopardy Clause. Kaiser asserts that his conviction and punishment for both the greater offenses charged in the indictment (the § 7201 offenses) and the lesser included offenses charged (the § 7206(1) offenses) violated the prohibitions of the Double Jeopardy Clause. The Double Jeopardy Clause of the Fifth Amendment prohibits the state from punishing a person twice for the same offense, *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977), and a greater offense and a lesser included offense are considered the "same offense" for purposes of Double Jeopardy Clause protection. While the government may charge a defendant with both a greater and a lesser included offense and may prosecute those offenses at a single trial, *see Ohio v. Johnson*, 467 U.S. 493, 500, 104 S.Ct. 2536, 2541, 81 L.Ed.2d 425 (1984), the court may not enter separate convictions or impose cumulative punishments for both offenses unless the legislature has authorized such punishment, *Id; Ball v. United States*, 470 U.S. 856, 861, 105 S.Ct. 1668, 1673, 84 L.Ed.2d 740 (1985); *see also Brown v. Ohio*, 432 U.S. at 169, 97 S.Ct. at 2227 (holding that the Double Jeopardy Clause prohibits successive prosecution and cumulative punishment for a greater and a lesser included offense).

In this case, whether the false return counts described in the indictment against Kaiser were lesser included offenses of the tax evasion counts can be determined from the face of the indictment. The court could not impose cumulative punishments for a greater and a lesser-included offense; to do so would violate double jeopardy protections. Therefore, under *Broce*, Kaiser's guilty plea did not waive his double jeopardy claim, and we must address the merits of the double jeopardy issue.[3]

[3] The government argues that the Supreme Court's decision in *Broce* is supportive of this court's reasoning in *United States v. Allen*, 724 F.2d 1556, 1558 (11th Cir.1984), in which this court held that the defendant

> waived his right to attack his conviction (by proving that two allegedly separate offenses were actually a single offense) when he pled guilty to both offenses and then failed to enter evidence at his sentencing hearing that the offenses were really the same. The government further contends that *Allen* controls the outcome of Kaiser's case. Even if the government is correct in arguing that *Broce* supports this court's analysis in *Allen,* the case before us is distinguishable from *Allen* in the same way that it is distinguishable from *Broce.* In *Allen,* like *Broce,* the defendant had to rely on information outside the existing record to prove his double jeopardy claim. Allen was sentenced on one count of transporting a stolen Ferrari and on one count of transporting a stolen Porsche. He argued on appeal that both cars were transported in a single shipment, and that therefore the two counts constituted a single offense. The fact that the two cars were shipped as part of a single shipment did not appear in the guilty plea record, and thus Allen was forced to go beyond the record to support his double jeopardy claim. Kaiser, on the other hand, can make his claim based on the record that existed at the time he made his plea.

II. THE DOUBLE JEOPARDY CLAIM

The Double Jeopardy Clause affords a defendant three basic protections: "[I]t protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Brown v. Ohio,* 432 U.S. at 165, 97 S.Ct. at 2225 (quoting *North* ***1304** *Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) (footnotes omitted)). Because this case involves a single prosecution, only the third protection is relevant here.

[3] The protection against multiple punishments is "designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Ohio v. Johnson,* 467 U.S. at 499, 104 S.Ct. at 2540–41. Whether punishments are multiple, for purposes of double jeopardy analysis, is a question of legislative intent. *Id.* If the statutes under which the defendant was sentenced specifically authorize cumulative punishments for the same offense, a court may impose cumulative punishment without running afoul of the Double Jeopardy Clause. *Missouri v. Hunter,* 459 U.S. 359, 368, 103 S.Ct. 673, 679, 74 L.Ed.2d 535 (1983); *United States v. Ricks,* 817 F.2d 692, 698-99 (11th Cir.1987). If, however, the statute does not clearly authorize cumulative punishment, then the court must apply the test set out in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), to determine if the offenses are sufficiently distinguishable to permit the imposition of cumulative punishment. *See Ohio v. Johnson,* 467 U.S. at 499 n. 8, 104 S.Ct. at 2541 n. 8; *Garrett v. United States,* 471 U.S. 773, 779, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985) (holding that "the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history").

Kaiser pleaded guilty to two violations of 26 U.S.C. § 7201 and two violations of 26 U.S.C. § 7206(1). Section 7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Section 7206 provides in relevant part:

> Any person who—
>
> (1) **Declaration under penalties of perjury.—** Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter ...
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Neither of these statutes contains clear and unambiguous language allowing cumulative convictions and punishments for one act of the defendant. The language "in addition to other penalties provided by law" contained in § 7201 (but not in § 7206(1)) does not rise to the level of clear authorization for multiple punishments that this circuit has recognized as sufficient in prior cases.[4] *See Fallada v. Dugger,* 819 F.2d 1564, 1572 (11th Cir.1987) (statute providing that "whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense," clearly indicated legislative intent to authorize cumulative punishment); *United States v. Ricks,* 817 F.2d 692, 698–99 (11th Cir.1987) (statute providing that "[w]hoever, during and in relation to any crime of violence, ... uses or carries a firearm, shall, in addition to the punishment ***1305** provided for such crime of

violence, be sentenced to imprisonment for five years" clearly indicated legislative intent to authorize cumulative punishment). *See also Whalen v. United States*, 445 U.S. 684, 691–92, 100 S.Ct. 1432, 1437–38, 63 L.Ed.2d 715 (1980) (holding that the statutes proscribing rape and the killing of a person in the course of a rape did not clearly authorize consecutive sentences where both statutes were violated in a single criminal episode). Moreover, the legislative history is silent on the question of whether consecutive sentences can be imposed for violations of §§ 7201 and 7206(1). Since congressional intent is not clear from the statute itself, we must turn to the *Blockburger* test to determine whether the offenses of which Kaiser was convicted are sufficiently distinguishable to permit cumulative punishment.

[4] The language "other penalties provided by law" may refer to additions to a tax, allowed under 26 U.S.C. §§ 6651–62, or to civil penalties allowed under 26 U.S.C. §§ 6671–6712. Of particular interest, § 6672(a) provides that "[a]ny person ... who ... willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded...." § 6672(a) also provides for a civil penalty for failure to "truthfully account for and pay over" any tax owed under the Code. Other sections allow civil penalties for failure to supply information and for supplying fraudulent information.

In *Blockburger v. United States*, 284 U.S. at 304, 52 S.Ct. at 182, the Supreme Court held that "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Here, Kaiser asserts that filing a false return is the same offense (by virtue of being a lesser included offense) as tax evasion by filing the same false return, and that the one offense does not require proof of an additional fact that the other does not. We start our *Blockburger* analysis by examining the statutory elements of each offense.

The elements of tax evasion under § 7201 are: (1) willfulness; (2) existence of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of the tax. *Sansone v. United States*, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965). The elements of false filing under § 7206(1) are: (1) the making and subscribing of a tax return containing a written declaration that it was made under the penalties of perjury; (2) by one who did not believe the return to be true and correct as to every material matter; and (3) who acted in a willful, as opposed to a negligent manner. *United States v. Edwards*, 777 F.2d 644, 651 (11th Cir.1985), *cert. denied*, 475 U.S. 1123, 106 S.Ct. 1645, 90 L.Ed.2d 189 (1986).

The offense of tax evasion under § 7201 has elements not required for the offense of false filing under § 7206(1)—a tax deficiency and an act constituting evasion or attempted evasion of the tax. In the abstract, the offense of false filing has an element not required for tax evasion—i.e., the filing of a return. However, we do not decide the issue at hand in the abstract. *See Illinois v. Vitale*, 447 U.S. 410, 419–21, 100 S.Ct. 2260, 2266–67, 65 L.Ed.2d 228 (1980). In *Vitale*, the Supreme Court noted that "[t]he mere possibility that the State will seek to rely on all of the ingredients necessarily included in the [lesser included offense] to establish an element of its manslaughter case [the greater offense] would not be sufficient to bar the latter prosecution [for the greater offense]." *Id.* However, the Court qualified that statement by adding that if the government did in fact rely on and prove the lesser included offense as the act necessary to prove the greater offense, the defendant would have a substantial double jeopardy claim under *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). In this regard the Court said:

> In *Harris*, we held, without dissent, that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. The Oklahoma felony-murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony-murder prosecution. But for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense. The State conceded that the robbery for which petitioner had been indicted ***1306** was in fact the underlying felony, all elements of which had been proved in the murder prosecution. We held the subsequent robbery prosecution barred under the Double Jeopardy Clause, since under *In re Nielsen*, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889), a person who has been convicted of a crime having several elements included in it may not subsequestly be tried for a lesser-included offense—an offense

> consisting solely of one or more of the elements of the crime for which he has already been convicted.

Vitale, 100 S.Ct. at 2267 (footnotes omitted).

Similarly, the Court held in *Whalen v. United States*, 445 U.S. 684, 694–95, 100 S.Ct. 1432, 1439, 63 L.Ed.2d 715 (1980), that two statutes, one prohibiting rape and the other prohibiting killing in the course of committing a felony, did not authorize consecutive sentences when both statutes were violated in a single criminal episode. The Court reasoned that although under the language of the statute felony murder could be committed during the course of a felony other than rape, in this case a conviction for felony murder could not be had without proving all of the elements of the offense of rape. Therefore, felony murder and rape were the same offense under the *Blockburger* test.

[4] The instant case involves the precise situation that *Vitale*, *Harris*, and *Whalen* point to as a double jeopardy violation. We are not faced with a situation in which there is a "mere possibility" that the government will rely on all of the elements of the lesser included offense to establish an element of the greater offense. Instead, we are confronted with a case in which the government must necessarily rely on all of the elements of the offense of false filing in order to establish an element of the greater offense of tax evasion. In a case such as this one, where tax evasion is charged solely by means of filing a false tax return under oath (i.e., a Form 1040), tax evasion includes as a legal necessity all the elements of false filing: filing a return under oath that is false as to a material matter, which the maker did not believe to be true, and which was willfully, as opposed to negligently done. Therefore, under the *Blockburger* test, the offense of filing a false return is a lesser included offense of tax evasion by means of filing the same false return.

This result is indicated by binding authority in this circuit. *United States v. Newman*, 468 F.2d 791, 796 (5th Cir.1972), *cert. denied*, 411 U.S. 905, 93 S.Ct. 1527, 36 L.Ed.2d 194 (1973), holds that a violation of § 7203 (misdemeanor failure to file a return) is a lesser included offense of § 7201 where the failure to file is the act that forms the basis of the tax evasion charge. *See also United States v. Buckley*, 586 F.2d 498, 503–04 (5th Cir.1978), *cert. denied*, 440 U.S. 982, 99 S.Ct. 1792, 60 L.Ed.2d 242 (1979) (The court held that failure to file is a lesser offense included in a § 7201 conviction. "Appellant argues, and we agree, that failure to file is a lesser offense included in a Section 7201 conviction based on the facts of this case. The government conceded as much at oral argument."). The reasoning of *Newman* and *Buckley* applies equally to a § 7201 indictment that alleges only the filing of a false return as the predicate act. *See also United States v. Stone*, 702 F.2d 1333, 1340 (11th Cir.1983) (government conceded that, in that case, the § 7206(1) offense was a lesser included offense of the § 7201 offense); *United States v. Beasley*, 519 F.2d 233, 249 (5th Cir.1975) (government conceded that the trial court erroneously imposed consecutive sentences for defendant's conviction for tax evasion and for the lesser included offense of filing a false return), *vacated on other grounds*, 425 U.S. 956, 96 S.Ct. 1736, 48 L.Ed.2d 201 (1976).

The other circuits that have considered this issue have similarly concluded that filing a false return is a lesser included offense of tax evasion by filing a false return and that therefore consecutive punishments for both offenses are impermissible. *See United States v. Lodwick*, 410 F.2d 1202, 1206 (8th Cir.), *cert. denied*, 396 U.S. 841, 90 S.Ct. 105, 24 L.Ed.2d 92 (1969); *Gaunt v. United States*, 184 F.2d 284, 288, 290 (1st Cir.1950), *cert. denied*, ***1307** 340 U.S. 917, 71 S.Ct. 350, 95 L.Ed. 662 (1951). *See also United States v. Gengo*, 808 F.2d 1, 3–4 n. 1 (2nd Cir.1986) (noting that filing a false return under § 7206(1) is a lesser included offense of tax evasion in violation of § 7201); *United States v. Rosenthal*, 454 F.2d 1252, 1255 (2nd Cir.), *cert. denied*, 406 U.S. 931, 92 S.Ct. 1801, 32 L.Ed.2d 134 (1972) (holding that an offense under § 7203 is a lesser included offense of § 7201, and that Congress did not intend two punishments for the one criminal activity). *But cf. United States v. Foster*, 789 F.2d 457, 459–61 (7th Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 273, 93 L.Ed.2d 249 (1986) (holding that Congress intended the § 7201 offense to be an offense separate from the misdemeanors in the Code, so § 7201 is a separate offense from both § 7203 offenses and § 7205 offenses).

For the foregoing reasons, we find that Kaiser may not be convicted and sentenced for both the greater offense of tax evasion and the lesser included offense of filing a false tax return. Thus, the convictions and sentences on the tax evasion counts are affirmed, but the convictions and sentences on counts three and four, the lesser included false filing counts, are vacated; and the judgment of the district court is affirmed and modified accordingly.

AFFIRMED AND MODIFIED.

Parallel Citations

65 A.F.T.R.2d 90-721, 90-2 USTC P 50,338

End of Document